

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Annual Assessment of the Status of)
Competition in the Market for the Delivery)
of Video Programming)

CS Docket No. 01-129

**COMMENTS OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION**

Satellite Broadcasting and
Communications Association

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I. INTRODUCTION AND SUMMARY

The Satellite Broadcasting and Communications Association (“SBCA”) is pleased to submit to the Commission its comments in the above-referenced Notice of Inquiry. The SBCA is the national trade association that represents the various industry sectors that are engaged in the delivery of television, radio and broadband services directly to consumers via satellite. The members of the Association include the C-Band and Direct Broadcast Satellite (DBS) carriers and distributors that provide television programming and broadband service directly to consumers; the programming services that offer entertainment, news and sports to consumers over satellite platforms; satellite equipment manufacturers and distributors; and satellite dealers and retail firms that sell systems directly in the consumer marketplace.

These comments encompass the July 1, 2000-July 1, 2001 period of competition. This time has seen continued growth by the satellite television providers and distributors, which are benefiting from gaining the authorization to retransmit the broadcast signals of local television

stations back into their local markets (“local-into-local”) from the 1999 Satellite Home Viewer Improvement Act (SHVIA). The DBS platform providers offer local-into-local broadcasts to over 40 Designated Market Areas (DMA) each. This encompasses over 61% of U.S. television households. However, the date of the implementation of satellite must-carry is looming on the horizon, and the DBS operators are unable to extend local-into-local to more DBS viewers in additional DMAs, in anticipation of the January 1, 2002 deadline. Without the approaching burden of the “carry one, carry all” regime, satellite industry executives estimate that they could offer local channels to more than 60 DMAs, reaching over 80% of U.S. television households.¹ In addition, in order to prosper, DBS must be protected from the threats of interference that would result if terrestrial service is permitted to share the DBS spectrum. Further, the satellite television industry urgently needs an extension of the program access prohibition on cable exclusivity.

II. DBS SUBSCRIBER TRENDS

The satellite television providers have gained more than 2.6 million net subscribers since reporting to the Commission last year on the status of competition in the video marketplace (see Table 1). This includes both C-band (the number of which has declined) and DBS subscribers. Overall, there are more than 17 million television households that receive television programming via satellite, an eighteen percent increase from the 14.4 million satellite subscribers

¹ Testimony of Eddy Hartenstein, Chairman and CEO, DIRECTV, Inc., before the U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Business Rights, and Competition, April 4, 2001.

last year. Our analysis is based on the data developed by the SkyTRENDS² program, which is the principal source of economic and subscriber trends in the industry.

The DBS providers gained more than three million subscribers, to bring the total of DBS customers to just over 16 million. The expansion of the retransmission of local network signals is a significant contributing factor to this growth. The DBS operators currently offer local-into-local in at least seven more markets than last year when we reported the tremendous favorable impact that the Section 122 license contained in SHVIA had on subscriber growth.

C-Band remains the delivery vehicle for a core contingent of satellite subscribers. There are still one million C-Band subscriptions in the U.S., down from the 1.4 million we reported a year ago. The decline is consistent with recent trends for C-Band satellite service. Nonetheless, satellite programmers remain committed to offering programming to this sector of the industry. SBCA believes that a small but dedicated C-Band subscribership will continue into the foreseeable future.

As DBS subscriptions continue to increase, so does the penetration rate of satellite television in the U.S. From April 2000 to April 2001,³ the average satellite television growth rate was 24.86% per state (See Appendix A). For the first time ever, one state has more than 4 out of 10 television households receiving multichannel video programming via satellite (Vermont- 41.27% penetration). Five states boast more than 3 of 10 television households subscribing to television programming via satellite (Montana, Wyoming, Mississippi, Arkansas, and Vermont). Table 2 shows the progress of satellite television penetration rates per state.

² SkyTRENDS is a partnership project between the SBCA and Media Business Corp., Denver, CO. Programs include the semi-annual SkyFORUM financial conferences, publication of the monthly SkyREPORT research publication, and the Effective Competition Tracking Reports that measure DTH market penetration.

³ The most recent state-by-state statistics available are through April 2001.

Ninety percent of states have at least one in ten television households with satellite television service.

Table 1

Satellite Television Subscriber Base⁴

	<u>Total Satellite Television</u>	<u>Total DBS</u>	<u>Total C-Band</u>
June 30, 1994	1,992,808	70,000	1,922,808
June 30, 1995	3,424,349	1,103,000	2,321,349
June 30, 1996	5,237,933	2,901,000	2,336,933
June 30, 1997	7,231,472	5,047,000	2,184,472
June 30, 1998	9,282,394	7,254,169	2,028,225
June 30, 1999	11,750,411	9,967,000	1,783,411
June 30, 2000	14,463,717	12,987,000	1,476,717
June 30, 2001	17,070,074	16,070,000	1,000,074

Table 2

Satellite Penetration Rate by State

	<u>>10%</u>	<u>>20%</u>	<u>>30%</u>	<u>>40%</u>
June 30, 1999	40	10	2	
June 30, 2000	44	24	3	
June 30, 2001	45	30	5	1

⁴ Figures may change slightly due to updating.

Also showing growth is the number of new DBS subscriptions per day. On average, almost 8,500 people sign up to receive DBS service *each and every day* of the year (See Table 3). In 2001, DBS attracted, on a daily basis, triple the number of new customers it did just seven years ago. The overall satellite television new subscriptions per day are slightly lower than reported last year, due to the number of consumers who deauthorized C-Band service daily.

Table 3

New Satellite Television Subscribers/Day

June 30 2000- June 30 2001 (National)

	<u>Total</u>	<u>DBS</u>	<u>C-Band</u>
1994-95	3,922	2,830	1,092
1995-96	4,969	4,926	43
1996-97	5,462	5,879	(418)
1997-98	5,619	6,047	(428)
1998-99	9,762	7,432	(671)
1999-00	7,434	8,274	(840)
2000-01	7,140	8,447	(1,306)

The satellite industry is also gaining subscribers from new consumer technologies being offered via satellite, including two-way high-speed (“broadband”) Internet service. Both DBS service providers introduced two-way broadband service to customers in the past year.

However, due to the infancy of the service, aggregated subscription data and consumer trends are not yet available.

Satellite broadband transmissions can, in most cases, be delivered to and from the same dish as video programming, making it an extremely convenient bundled service for subscribers. Broadband satellite companies will build on the success of satellite television platforms that currently provide service to rural counties throughout the U.S. Satellites provide instant communications at competitive prices to any consumer who is located inside the national footprint. In stark contrast to ubiquitous satellite services, terrestrial wireline services must build out their systems over time and have failed to do so in less populated areas because of higher per capita costs. For many sparsely populated areas, satellites will be the only realistic source for broadband services.

III. MUST-CARRY

The SBCA and DBS member companies DIRECTV, Inc. (“DIRECTV”) and EchoStar Communications Corp. (“EchoStar”), with the support of many of SBCA’s programmer members, are challenging the must-carry provision of SHVIA both in federal court and at the FCC. The SBCA has argued that the satellite must-carry regime of SHVIA is unconstitutional, violating a satellite carrier’s right to select (and exclude) content delivered via a private medium. This is contrary to the First Amendment’s protection of the freedom of speech. In addition, SBCA believes that the forced-carriage requirement constitutes a taking of the satellite carriers’ property (e.g., local receive facilities, spectrum) without just compensation, in violation of the Fifth Amendment’s takings clause and due process.

The forced carriage of all local stations in a DMA if a satellite operator elects to retransmit even one local station in that market is slated to go into effect on January 1, 2002. The DBS providers, anticipating that they will be forced to carry these stations, are reserving spectrum and losing the opportunity to provide local-into-local network affiliate broadcasts to additional consumers. The 2000 Report⁵ attributes last year's "significant increase in DBS subscribership...in part to the authority granted to DBS providers in late 1999 to offer 'local-into-local' service."⁶ This augmented subscriber growth would be greatly enhanced without the threat of satellite must-carry. DBS industry leaders estimate that more than 60 DMAs would receive local-into-local service if DBS providers weren't saddled with the burden of must-carry. This would extend service of local-into-local broadcasts to more than 80% of U.S. television households.

The SBCA fully supports DIRECTV's Petition for Reconsideration of the Commission's Order⁷ implementing satellite must-carry. DIRECTV asks the Commission to review specific parts of the Order: the carriage of more than one non-commercial educational station per DMA; the carriage of additional material in the vertical blanking interval; using the cable standard for determining whether a broadcaster's over-the-air signal qualifies as a "good quality signal"; forcing satellite carriers to pay for signal delivery if they move their local receive facility; and prohibiting satellite carriers from offering local-into-local service using satellites at different orbital positions.

⁵ Seventh Annual Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("2000 Report"), CS Docket No. 00-132, FCC No. 01-1 (rel. January 8, 2001).

⁶ 2000 Report at ¶68.

⁷ In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues, *Report and Order*, CS Docket Nos. 00-96, 99-363, FCC No. 00-417 (rel. Nov. 30, 2000).

An issue related to satellite must-carry is the dual carriage of a station's analog and digital signal during the transition from an analog to a digital broadcasting environment. The SBCA filed comments in that proceeding⁸ (see Appendix B), taking a general position against any forced-carriage regime. Specific to dual carriage, it is premature to consider digital carriage issues at this time. The digital landscape is still very murky, and the outstanding questions regarding the transition are far from being answered. We support the Commission's sound conclusion in the *FNPRM* that dual carriage is inappropriate and would reduce competition in the multichannel video marketplace.

IV. PROGRAM ACCESS

The SBCA credits the program access rules, which were created by the 1992 Cable Act,⁹ with helping DBS to become the only viable competitor to cable services. The rules require that vertically-integrated programmer/cable companies sell their programming to all multichannel video programming distributors (MVPDs) at non-discriminatory prices, terms, and conditions. This provision allows the DBS platform providers to offer comparable programming at rates comparable to those of cable operators, which levels the playing field considerably in the multichannel video marketplace.

Without action by the Commission, the program access provision prohibiting exclusive contracts between cable operators and affiliate programmers will expire on October 5, 2002, ten years after the enactment of the Cable Act. The Commission has the authority to conduct an inquiry in the year before the prohibition sunsets in order to determine if it should be extended

⁸ In the Matter of Carriage of Digital Television Broadcast Signals, *Further Notice of Proposed Rulemaking*, CS Docket No. 98-120, FCC No. 01-22

past 2002. The SBCA is pleased that FCC Chairman Powell has announced plans to conduct such an inquiry. Although DBS's market share has grown since the prohibition was enacted, cable still delivers multichannel video services to approximately 80 % of U.S. television households.¹⁰ If the prohibition is not extended, it will limit the DBS operators' ability to continue to compete effectively with programming offerings provided by cable operators. This would harm the competition in the multichannel video marketplace that the Commission and Congress have labored for over a decade to foster.

In addition, the SBCA believes that the program access rules should cover *all* programming owned by vertically integrated programmer/cable companies, regardless of the technology by which it is delivered. As currently written, the program access rules only cover "satellite cable programming or satellite broadcast programming." Some cable companies have begun offering highly desirable programming, such as regional sports networks, via terrestrial feed. The Commission has ruled that the program access rules may apply to programming delivered terrestrially if it is so delivered with the intent to circumvent the prohibition. However, this is an almost insurmountable burden for satellite providers to prove. If the rules are not extended to include all programming offered by vertically integrated programmer/cable companies, regardless of intent, the DBS operators will not be able to compete as effectively in the multichannel video marketplace, contrary to the purpose of the program access prohibition of the Cable Act.

⁹ 47 U.S.C. §548 (c)(2)

¹⁰ 2000 Report at ¶5.

V. SPECTRUM SHARING

The SBCA is critically concerned about the sharing of spectrum allocated for satellite services. In the past year, there have been several applications to the Commission by terrestrial wireless services seeking the right to operate in the spectrum set aside for DBS operations. At these frequencies, satellite functions have primary status. The SBCA opposes any such licensing by the Commission.

A. The 12.2-12.7 GHz Band

As a result of the Commission's policies, DBS has become, in the words of the Commission, "the principal competitor of cable television service"¹¹ in the video programming distribution market and has enormous potential to be the premier provider of ubiquitous and sophisticated broadband services as well. Indeed, one of the primary benefits of DBS—a benefit that derives from its satellite architecture—is that it can and does reach nearly every American home with a high quality digital signal, including homes and businesses in remote, rural and underserved areas that otherwise would not receive *any* broadcast or advanced telecommunications services.

Over the past two decades, the Commission and Congress have nurtured DBS service as the best hope for opening the multichannel video programming distribution market to real competition. During this time, the Commission developed a spectrum management policy that established competition between DBS and other multichannel video programming distribution services. A principal element of this policy is that DBS is given primary status in the 12.2-12.7

¹¹ *Id.* at ¶ 61.

GHz (“12 GHz”) spectrum band.¹² The Commission has steadfastly kept that band clear of terrestrial incumbents for DBS use, and the DBS industry has responded by investing billions of dollars to provide consumers with an alternative to cable for video programming.

Last year, the Commission determined that, in theory, terrestrial Multipoint Video Distribution and Data Services (MVDDS) operations in the 12.2-12.7 GHz frequency band¹³ were feasible, and sought comment on proposed service, licensing and technical rules that might permit MVDDS to share the spectrum with incumbent DBS operations. In the accompanying *FNPRM*, the Commission suggested mitigation techniques that might be employed to lower the interference that MVDDS causes DBS service when operating in the 12 GHz band. In previous filings to the Commission, the SBCA and the satellite television providers ardently opposed this licensing and any mitigation techniques at DBS consumer premises.

If the Commission allows MVDDS operations to occupy the 12 GHz band with incumbent DBS operations, the Commission will have reversed over two decades of spectrum management policy and placed into jeopardy the lone successful competitor to incumbent cable monopolists. Specifically, the Commission would be allowing a ubiquitous terrestrial service that would cause harmful interference to priority DBS service to operate in the 12 GHz band. We remain troubled that the Commission has authorized MVDDS on a non-interference basis, knowing full well that harmful interference is an elemental aspect of MVDDS design. The Commission attempts to justify this decision on the assumption that unproven, after-the-fact interference mitigation measures might be developed and implemented to lessen the proven harmful interference that MVDDS will cause to DBS operations.

¹² 47 C.F.R. § 101.147(p).

¹³ *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, ET Docket No. 98-206, First

MVDDS is the third ubiquitous service to be authorized by the Commission to operate in the 12.2-12.7 GHz spectrum, where DBS service has primary status. When the Commission permitted spectrum sharing between the Non-Geostationary Orbit Fixed Satellite Systems (NGSO FSS) and DBS operations, it was *only* because the parties affected had reached a consensus agreement that sharing was possible between the two satellite systems with limited interference. No such compromise solution was ever discussed with respect to MVDDS/DBS/NGSO FSS sharing. Indeed, there was *no* record developed with respect to MVDDS because there is no international allocation at 12 GHz for MVDDS. With the notable exception of ET Docket No. 98-206, the Commission has consistently and repeatedly found—as recently as 1999—that band sharing between terrestrial point-to-multipoint and satellite services is not workable.¹⁴

The Commission claims to have adopted MVDDS “[a]fter an exhaustive analysis and the time-consuming development on the international front of a consensus regarding critical technical issues.”¹⁵ However, the consensus regarding critical technical issues to which the Commission refers was that the DBS industry agreed that NGSO FSS operations could be permitted in the 12.2-12.7 GHz band on a secondary basis to DBS, predicated upon a maximum 10 percent aggregate increase of service unavailability from all non-DBS operations. This understanding was codified in an International Telecommunications Union (“ITU”) recommendation that was supported by the United States. In fact, the extensive work performed

Report and Order and Further Notice of Proposed Rulemaking, FCC 00-418 (Dec. 8, 2000) (“*First Report and Order*”).

¹⁴ The NGSO FSS/DBS compromise was predicated on a 10 percent maximum increase in DBS service unavailability from the aggregate interference caused by all other services- not just NGSO FSS. See Recommendation ITU-R BO.1444.

¹⁵ *First Report and Order* ¶ 18.

under the auspices of World Radio Conferences (“WRC”) in 1997 and 2000 with respect to NGSO FSS was not directed at MVDDS operations.

In the 2000 Commerce, Justice, State and Judiciary Appropriations Act¹⁶ (at §1012, Prevention of Interference to DBS Services), Congress mandated that the Commission procure or arrange for an independent test to determine if allowing MVDDS to share the 12 GHz band with DBS services would cause interference to the television signals currently received by over 40 million satellite television viewers. The Commission selected The MITRE Corporation (“MITRE”) to perform the test. MITRE measured the radiation patterns of three DBS antennas and two MVDDS antennas.

MITRE released the result of their testing, entitled *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band* (“MITRE Report”), in April. The MITRE Report’s very first conclusion is that “MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a *significant interference threat* to DBS operation in many realistic operational situations.”¹⁷ The MITRE report finds that, “MVDDS/DBS bandsharing appears feasible if and only if suitable mitigation measures are applied.”¹⁸ However, the type of mitigatory measures suggested by MITRE that are necessary to make sharing even “feasible” are untested, expensive and burdensome, and will not be able to eliminate the interference to all DBS subscribers, leaving residual interference to currently satisfied customers.

As SBCA and others in our industry have argued in prior filings to the Commission, it is undisputed that harmful interference exists as an elemental aspect of MVDDS design. The

¹⁶ H.R. 5548, Pub. L. No. 106-553, 114 Stat. 2762A-141 (2000).

¹⁷ MITRE Report at xvi.

¹⁸ *Id.* at xvii.

MITRE Report effectively confirms this fact. Attempting to address the harmful interference caused by MVDDS through mitigation is inappropriate.

Moreover, any mitigation measures that would be implemented at a DBS consumer's premises are unprecedented and unlawful. Many of the potential mitigation measures suggested by MITRE and the Commission involve unacceptable retrofitting or other alterations of DBS consumers' private property, which, if authorized, would be tantamount to a *de facto* conversion of DBS into a secondary service.

Fortunately, there is a simple solution that would allow MVDDS providers to offer their proposed terrestrial service on a basis that would not interfere with the signals received by satisfied DBS customers. There is ample alternative spectrum which has already been allocated for the identical purpose of providing point-to-multipoint video programming and data services, such as the 2.5 GHz band allocated to Multichannel Multipoint Distribution Service ("MMDS"), the 24 GHz band allocated to Digital Electronic Message Service ("DEMS"), the 28 GHz band allocated to Local Multipoint Distribution Service ("LMDS") and the 39 GHz band. Neither the Commission nor potential MVDDS providers have explained why MVDDS cannot operate in those frequency bands, where it will not cause harmful interference to existing services.

The SBCA and the satellite television providers would welcome competition from new providers of multichannel video programming if it can be provided on a non-interfering basis. However, permitting terrestrial uses of the 12 GHz band that would interfere with DBS operations is unacceptable. In fact, the Commission's action of authorizing MVDDS to operate in the 12 GHz band, and therefore degrading DBS service, will impede the continuing success of DBS as a true competitor in the multichannel video marketplace.

B. Fixed Service Terrestrial Microwave Operators

In May 1999, a group of fixed service (FS) terrestrial microwave operators filed a petition for rulemaking with the Commission, requesting the alteration of spectrum coordination regulations of FS and fixed satellite services (FSS).¹⁹ The SBCA and its sister organization the Satellite Industry Association (SIA) oppose the proposed change to the rules. The suggested modification would significantly limit the flexibility for FSS earth station operations. There is no evidence before the Commission that the rule changes are needed. Earth station operators need flexibility in licensing to be able to respond to changing customer requirements; restore service in the event of a facility failure; make adjustments to facilitate coordination with adjacent satellites; launch replacement satellites that take advantage of technological advances; and manage overall network capacity efficiently.

C. Mobile Satellite Services at 2 GHz

In May 2001, cellular interests filed a petition for rulemaking at the Commission,²⁰ asking that mobile satellite services (MSS) spectrum in the 2 GHz band be reallocated for other uses, citing underutilization of the spectrum by MSS. The SBCA and SIA dispute the need for the reallocation of this spectrum. Mobile satellite telephony is still in the early stage of development. Satellite services have a proven track record of being the best means of communications for rural areas in the U.S, and for situations that require instant or emergency communication in remote areas throughout the world. In the future, MSS will offer Third

¹⁹ Request for Declaratory Ruling and Petition for Rule Making of the Fixed Wireless Communications Coalition, May 5, 1999.

²⁰ Petition for Rulemaking of the Cellular Telecommunications & Internet Association, May 18, 2001.

Generation (3G) voice and data services complementing those offered by terrestrial wireless service providers.

MSS is expanding from merely providing telephone service to remote locations to ensuring availability of broadband access to a large segment of the global population. The MSS spectrum at 2 GHz is needed to ensure the availability of such services in areas beyond the reach of terrestrial cellular systems. The SBCA is encouraged by the International Bureau's recent authorization of new MSS systems in the 2 GHz band, which recognizes that mobile satellite services in this band will offer consumers new choices in advanced technology.

VI. CONCLUSION

The competitiveness of satellite providers in the multichannel video marketplace has been strengthened by their ability to offer local-into-local service to viewers as authorized by SHVIA. In seven short years, the number of subscribers to DBS service has reached 16 million. The number of new subscribers to DBS service per year continues to grow. However, there are outstanding issues that could hinder the ongoing success of satellite service as the only competitor to cable for the delivery of multichannel video programming. The regime of satellite must-carry will limit the ability of DBS operators to expand the number of markets that could enjoy local-into-local. Satellite providers will be charged different rates than cable operators for identical programming by vertically integrated programmer/cable companies without an extension of the program access prohibition. Ruinous interference to DBS operations will occur if terrestrial users are licensed to operate in the same spectrum as satellite service, degrading the quality of DBS service, and thus reducing competition.

If these barriers to competition are quickly and efficiently removed, the satellite television providers will be in a position to become a competitor to the cable monopoly on a scale that the Commission and Congress have long envisioned. Otherwise, many consumers will continue to confront frustrating barriers to choice and increased competition in the multichannel video marketplace.

Respectfully submitted,

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APPENDIX A

State-by-State Penetration Rates

STATE	STATE ABBREV	Nielsen TV HH	DTH Subs	DTH % Penetration
Vermont	VT	227,350	93,834	41.27
Montana	MT	336,530	130,265	38.71
Wyoming	WY	180,170	60,701	33.69
Mississippi	MS	1,004,040	328,735	32.74
Arkansas	AR	976,010	296,411	30.37
Idaho	ID	457,790	130,755	28.56
North Dakota	ND	246,460	70,203	28.48
North Carolina	NC	2,988,960	836,370	27.98
Kentucky	KY	1,516,310	413,281	27.26
Missouri	MO	2,113,950	561,079	26.54
West Virginia	WV	706,080	184,969	26.20
South Carolina	SC	1,460,980	380,088	26.02
Utah	UT	682,150	174,374	25.56
Texas	TX	7,265,760	1,807,817	24.88
New Mexico	NM	620,020	153,139	24.70
Indiana	IN	2,266,720	558,222	24.63
South Dakota	SD	275,600	67,705	24.57
Tennessee	TN	2,139,070	515,406	24.09
Alabama	AL	1,678,690	400,218	23.84
Georgia	GA	2,936,690	684,600	23.31
Virginia	VA	2,607,330	605,594	23.23
Oklahoma	OK	1,288,600	298,910	23.20
Maine	ME	489,530	110,871	22.65
Iowa	IA	1,115,900	251,434	22.53
Colorado	CO	1,645,010	358,345	21.78
Wisconsin	WI	2,013,950	430,336	21.37
Arizona	AZ	1,892,010	402,494	21.27
Nebraska	NE	640,330	135,266	21.12
Oregon	OR	1,276,210	263,393	20.64
Kansas	KS	1,017,970	208,597	20.49
Minnesota	MN	1,825,000	363,307	19.91
Michigan	MI	3,699,480	680,788	18.40
Louisiana	LA	1,587,770	287,517	18.11
Florida	FL	6,170,820	1,101,687	17.85
Washington	WA	2,212,180	378,768	17.12
Ohio	OH	4,302,770	700,494	16.28
New Hampshire	NH	459,220	72,958	15.89
Nevada	NV	788,220	125,080	15.87
Illinois	IL	4,442,640	693,730	15.62
California	CA	11,561,050	1,777,162	15.37
Delaware	DE	290,470	43,215	14.88
Maryland	MD	1,921,640	277,532	14.44
Alaska	AK	184,870	24,959	13.50
New York	NY	6,613,410	831,519	12.57
Pennsylvania	PA	4,559,840	541,229	11.87
New Jersey	NJ	2,951,700	298,611	10.12
Rhode Island	RI	375,750	35,713	9.50
D.C.	DC	216,780	19,997	9.22
Massachusetts	MA	2,336,260	178,572	7.64
Connecticut	CT	1,236,050	88,927	7.19
Hawaii	HI	382,720	6,900	1.80



Growth Rate of DBS Penetration

STATE	STATE ABBREV	3 Month	6 Month	12 Month
Alabama	AL	3.60	8.88	14.57
Alaska	AK	2.95	13.29	26.62
Arizona	AZ	7.33	16.75	29.54
Arkansas	AR	6.85	12.58	19.68
California	CA	7.92	18.87	41.43
Colorado	CO	4.32	11.03	26.14
Connecticut	CT	6.24	13.97	31.96
D.C.	DC	8.24	17.50	50.35
Delaware	DE	2.17	6.30	21.38
Florida	FL	6.35	13.61	28.46
Georgia	GA	7.01	14.83	28.48
Hawaii	HI	18.29	48.20	186.19
Idaho	ID	2.33	6.67	12.54
Illinois	IL	7.64	15.76	30.52
Indiana	IN	4.75	10.92	18.43
Iowa	IA	2.97	7.98	12.15
Kansas	KS	3.52	7.37	11.29
Kentucky	KY	3.33	8.74	11.96
Louisiana	LA	5.91	12.39	22.94
Maine	ME	1.42	2.52	4.68
Maryland	MD	6.45	14.30	38.14
Massachusetts	MA	4.94	11.80	34.76
Michigan	MI	3.50	7.82	16.05
Minnesota	MN	4.56	11.71	23.78
Mississippi	MS	6.44	16.04	24.94
Missouri	MO	5.05	11.03	21.20
Montana	MT	0.83	3.25	0.04
Nebraska	NE	2.45	6.72	12.62
Nevada	NV	3.97	10.65	20.97
New Hampshire	NH	3.73	9.43	21.93
New Jersey	NJ	8.87	20.41	50.51
New Mexico	NM	3.64	8.98	13.92
New York	NY	6.29	12.68	28.10
North Carolina	NC	4.78	10.06	19.52
North Dakota	ND	0.24	2.39	4.53
Ohio	OH	6.62	14.83	26.60
Oklahoma	OK	3.41	8.28	16.53
Oregon	OR	3.03	8.52	14.49
Pennsylvania	PA	4.37	10.37	24.08
Rhode Island	RI	2.98	8.78	24.06
South Carolina	SC	6.55	13.95	21.46
South Dakota	SD	0.45	4.49	9.23
Tennessee	TN	4.67	11.13	19.25
Texas	TX	5.27	12.41	29.70
Utah	UT	6.53	14.98	26.30
Vermont	VT	1.59	6.26	11.07
Virginia	VA	5.08	12.23	28.22
Washington	WA	4.26	10.03	19.28
West Virginia	WV	3.19	7.38	13.25
Wisconsin	WI	3.32	6.84	15.11
Wyoming	WY	1.60	4.87	8.97

APPENDIX B

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SATELLITE BROADCASTING AND COMMUNICATIONS
ASSOCIATION
and ECHOSTAR COMMUNICATIONS, INC.,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Review from the
Federal Communications Commission

BRIEF OF PETITIONERS

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JURISDICTION STATEMENT

The Federal Communications Commission (“FCC”) had jurisdiction over this matter pursuant to 47 U.S.C. § 338(g). This Court has jurisdiction over this review of a final order of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1), 2344. Petitioners participated in the rulemaking proceedings before the FCC, and are parties aggrieved within the meaning of 28 U.S.C. § 2344. The final order to be reviewed was published January 23, 2001, and the Petitions for Review were timely filed on February 1 and 2, 2001.

STATEMENT OF THE CASE

Satellite carriers operate what are, in essence, electronic magazines. Like newspaper editors, bookstore owners, publishing houses, parade organizers, website designers, cable system operators, and television broadcasters, satellite carriers exercise editorial discretion in the selection of video programming and other types of speech offered on their systems. This right to select (and to exclude) content delivered via a private medium of expression is protected by the First Amendment. The statutory provision at issue in this case, and the FCC regulations promulgated to implement it, invades this constitutionally protected sphere of free speech and press.

I. SHVIA’S STATUTORY COPYRIGHT LICENSE AND THE CARRY-ONE, CARRY-ALL RESTRICTION

Since the introduction of satellite television, providers of satellite television service (“satellite carriers”) have offered subscribers a wide array of video and audio programming, including cable networks (e.g., ESPN and CNN), pay-per-view programs, and music. However, prior to the enactment of the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (“SHVIA”), satellite carriers were not permitted to offer their subscribers local television broadcast channels (including, for example, local affiliates of the four major television networks, NBC, CBS, ABC, and Fox).

Concerned that this limitation put satellite carriers at a “significant competitive disadvantage to cable television service,” S. REP. NO. 106-51, at 3 (1999) (“Senate Report”), A138;¹ *see also* H.R. CONF. REP. NO. 106-464, at 93-94 (1999) (“Conference Report”), A145-46, Congress created a statutory copyright license authorizing satellite carriers to retransmit, via satellite, local television broadcast signals to their subscribers in that station’s local market (“local-into-local” retransmission). SHVIA § 1002, *codified at* 17 U.S.C. § 122.

The statutory copyright license does *not* override any property rights in programming held by local broadcasters, but rather simply ensures that

satellite retransmission of the broadcaster's signal is not subject to the thousands of underlying copyrights governing "each of the programs, advertisements, and music aired by that station" 24 hours per day, 365 days per year. *In re Implementation of SHVIA*, C.S. Docket Nos. 99-96 & 99-363, Report and Order ¶ 15 (Nov. 30, 2000) ("FCC SHVIA Order"), A27. In this respect, SHVIA merely put satellite carriers in the same position that cable operators have long occupied under a similar statutory license for cable retransmission of broadcast signals. *See* 17 U.S.C. § 111. "Congress was aware that cable operators would face virtually insurmountable technical and logistical problems if they were required to block out all programs as to which they had not directly obtained copyright permission from the owner." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 n.13 (1984) (citing legislative history of cable statutory license). Congress recognized that the same barrier effectively prohibited satellite carriage of local broadcast stations absent a statutory copyright license.²

While SHVIA thus served the salutary purpose of increasing competition among video providers, the provision of the statute at issue in this case fosters the anticompetitive goal of supplanting the editorial

¹ Petitioners' Appendix is cited "A."

² *See, e.g.*, Senate Report 3, A138 ("Satellite television companies are *prohibited* under the terms of the Satellite Home Viewer Act (SHVA) and the Copyright Act from providing their subscribers with signals from local network stations as a component of their satellite television service.") (emphasis added); Conference Report 93, A145 ("section 122 license allows satellite carriers *for the first time* to provide their subscribers with the television signals they want most: their local stations") (emphasis added).

prerogatives of satellite carriers in order to favor one particular kind of broadcast station—small, typically independent local stations that would not otherwise merit satellite carriage as a matter of viewer demand.

Specifically, “each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station *shall carry* upon request the signals of *all* television broadcast stations located within that local market, subject to section 325(b).” SHVIA § 1008(a), *codified at* 47 U.S.C. § 338(a) (emphases added).

Thus, the forced-carriage requirement of section 338 is *conditional*. If a satellite carrier chooses to carry any one television station in any market (with that station’s consent), then it is required to carry *every* local station in that same market upon demand. A satellite carrier choosing to carry a single local station in, say, the New York City market, therefore must carry 23 additional local stations as well. The statute’s “carry-one, carry-all” regime thus divests a satellite carrier of *any* editorial discretion over the selection of broadcast programming in any market in which it chooses to offer local broadcast programming. The carry-one, carry-all requirement becomes effective on January 1, 2002. 47 U.S.C. § 338(a)(3).

SHVIA specifically provides that a satellite carrier may not request or receive *any* compensation for its forced carriage of unwanted local broadcast stations. 47 U.S.C. § 338(e). Satellite carriers must pay, however, for the right to carry the local stations they want to offer to subscribers. By providing that the carry-one, carry-all regime is “subject to section 325(b),” 47 U.S.C. § 338(a), SHVIA gives local broadcasters the option either to insist on compensation from satellite carriers for the right to retransmit their signals or to elect forced carriage under section 338. *See* 47 U.S.C. § 325(b)(1).

Thus, local broadcast stations may elect to negotiate a retransmission consent agreement with satellite carriers or they may elect to force satellite carriage under the carry-one, carry-all provision. As a practical matter, stations in each market that are popular with viewers, and therefore with satellite carriers – typically the affiliates of the major broadcast networks – will choose to negotiate retransmission agreements because satellite carriers will pay for their signal in order to provide the local programming that satellite subscribers demand. In contrast, less popular broadcast channels will elect forced carriage because in a competitive market for satellite carriage, carriers will not voluntarily elect to devote a valuable channel to a station that lacks strong viewer demand.

II. PURPOSE OF THE CARRY-ONE, CARRY-ALL

RESTRICTION

Congress candidly acknowledged that the carry-one, carry-all regime was designed to

prevent[] satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent

must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.

Conference Report 101, A149.

Concerned that the program content of independent local stations typically lacks strong viewer demand in the marketplace, Congress determined that unless satellite carriers were forced to retransmit the programming of such stations, satellite subscribers would not expend any effort to “obtain over-the-air signals from independent broadcast stations.” *Id.* at 102, A150. Congress therefore enacted the carry-one, carry-all provision (codified as part of federal communications law at 47 U.S.C. § 338) as a condition on availability of the statutory copyright license (codified as part of federal copyright law at 17 U.S.C. § 122) in order to manipulate the editorial policies of satellite carriers. The *quid pro quo* in SHVIA could hardly be more open or explicit: “The conference report added the cross-reference to section 122 to the House provision to indicate the relationship between the benefits of the statutory license and the carriage requirements imposed by this Act.” 145 CONG. REC. S14711 (daily ed. Nov. 17, 1999)(statement of Sen. Lott). SHVIA’s statutory copyright license is unique; no other statutory license conditions the *voluntary* use by a private speaker of *wanted* copyrighted materials upon the *forced* use of *unwanted* copyrighted materials.

III. THIS PROCEEDING

SHVIA required the FCC to promulgate rules implementing the statutory carry-one, carry-all scheme. 47 U.S.C. § 338(g). The FCC published its final rule implementing the carry-one, carry-all provisions of section 338, *see* FCC SHVIA Order, A18-119, specifically acknowledging that it had no authority to pass upon the constitutional issues raised by the statute. *Id.* ¶ 13, A25.

On February 1, 2001, petitioner Satellite Broadcasting and Communication Association (“SBCA”), a trade association representing all satellite carriers, filed a petition for review with this Court raising a facial constitutional challenge to SHVIA and the regulations promulgated by the FCC to implement the statute. SBCA Petition for Review 3, A122.

Petitioner Echostar Satellite Corporation (“Echostar”), a satellite carrier, filed a similar petition in the Tenth Circuit, *see* Echostar Petition for Review, A123-25, and the National Association of Broadcasters (“NAB”) filed a petition for review in the D.C. Circuit. On February 9, 2001, this Court was selected pursuant to 28 U.S.C. § 2112(a)(3) to hear all the petitions for review in this matter. Subsequently, the NAB sought and received this

Court's permission to intervene as a respondent to defend the constitutionality of SHVIA.³

STATEMENT OF FACTS

III. EFFECT OF THE CARRY-ONE, CARRY-ALL REQUIREMENT ON SATELLITE CARRIERS

There are currently two full-service satellite carriers competing with cable operators to provide consumers with multichannel video programming. DIRECTV is the largest carrier with 8.7 million subscribers as of June 2000; petitioner Echostar had 4.3 million subscribers as of June 2000. FCC Seventh Annual Report on Competition in the Market for Delivery of Video Programming, C.S. Docket No. 00-132, ¶¶ 62-63 (Jan. 8, 2001) (“FCC Seventh Annual Report”), A129-30. Both DIRECTV and Echostar maintain satellites located in geostationary orbit from which they transmit signals that are received by subscribers on 18-inch satellite dishes. FCC SHVIA Order ¶¶ 6-7, A21-22. Broadcast satellites are located in fixed “orbital slots” spaced nine degrees longitude apart around the equator. Three orbital slots, located at 101, 110, and 119 degrees west longitude (“WL”), are “full-CONUS” slots, meaning that signals transmitted from satellites in these slots reach the entire continental United States. Each satellite in a full-CONUS slot can transmit signals on 32 different frequencies. Using digital compression technology, a maximum of approximately ten distinct channels

³ Petitioners SBCA and Echostar (along with the other major satellite carrier, DIRECTV) have brought suit in the Eastern District of Virginia challenging the constitutionality of the carry-one, carry-all

of traditional video programming can be broadcast on each frequency, for a total of roughly 320 such channels from each full-CONUS slot. *Id.* ¶ 6 n.12, A21. Thus, given present technology, the two major satellite carriers, Echostar and DIRECTV, currently have a combined total channel capacity of about 960 channels capable of carrying video programming to the entire continental United States.⁴

In light of this limited capacity, satellite carriers necessarily exercise editorial discretion in the selection of content that they offer to the public. They must choose from among hundreds national cable channels, numerous specialty, sports, and regional video channels, pay-per-view offerings, music channels, internet services, and other programming services. *See* FCC Seventh Annual Report ¶ 23, A128 (190 national cable channels alone at the end of 1999). There are also more than 1800 local television broadcast stations in the United States. *See* Nielsen Media Research, 1999-2000 Directory of TV Stations 26-39, A155-68.

No presently available technology would allow either DIRECTV or Echostar to deliver all of these stations along with all the other programming that they presently offer to their subscribers. The FCC found that “satellite carriers, like cable operators, have limited capacity to add additional

provision. FCC SHVIA Order ¶ 10 n.16, A24. That suit remains pending.

⁴ In addition, Echostar has rights to 11 frequencies at 61.5 WL, and 24 frequencies at 148 WL. From these slots, Echostar can deliver approximately 80 channels of traditional video programming to subscribers east of Denver and 112 channels west of the Rockies.

channels of programming[, and] Congress . . . was aware of these concerns when it promulgated Section 338.” FCC SHVIA Order ¶ 139, A78.

Indeed, the SHVIA Conference Committee explicitly acknowledged that “[b]ecause of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets.” Conference Report 102, A150.

The FCC found that “[a]s of November 27, 2000, DirecTV offers local-into-local service in 38 television markets whereas Echostar offers such service in 34 television markets.” FCC SHVIA Order ¶ 8, A22.⁵ Because the carry-one, carry-all requirement has not yet taken effect, each satellite carrier currently offers only “the local ABC, NBC, CBS, and Fox network affiliates,” along with a few “other stations in certain markets” *Id.* n.14, A22. Thus, Echostar currently devotes approximately 140 channels to local-into-local service, while DIRECTV devotes about 170 channels to local broadcasters. Their remaining channel capacity is consumed by national cable and other programming.

The top ten media markets in the United States have 184 local television broadcast stations. *See* FCC SHVIA Order, Appendix J, A115-19 (ranking 210 local television markets in order of size); Nielsen Media

⁵ DIRECTV has since expanded into 3 more markets.

Research, 1999-2000 Directory of TV Stations 26-39, A155-68 (identifying each TV station in each local market). There are approximately 562 broadcast stations in the 38 markets served by DIRECTV and about 528 such stations in the 34 markets now served by Echostar. *Id.*

If SHVIA forced carriage goes into effect, DIRECTV and Echostar will have no editorial discretion over local signals in these markets and will be required by government mandate either to carry every one of the hundreds of broadcast stations in these markets or to withdraw altogether from providing local-into-local coverage in such markets. Both Echostar and DIRECTV have developed (but have not yet deployed) “spot beam” satellites that could allow for transmission of some programming by region, rather than on a national basis, thereby increasing somewhat their channel capacity for local-into-local coverage. But even assuming they are able to launch and operate these “spot beam” satellites before January 1, 2002, the additional capacity they are expected to provide will simply allow Echostar and DIRECTV to continue to provide local-into-local service to the markets they serve today.

If they are subject to SHVIA’s carry-one, carry-all requirement, the satellite carriers will not have channel capacity to expand service beyond the top 40 or so media markets in the United States. Due to the channel capacity that will be consumed by the requirement to carry every station in large

media markets, DIRECTV and Echostar will lack the channel capacity to carry any local stations at all in numerous mid-sized and smaller local markets throughout the nation. Consumers in markets such as Richmond, Norfolk, Greensboro, Charleston, West Virginia, and Columbia, South Carolina, all of which are ranked between 41 and 85, *see* FCC SHVIA Order, Appendix J, A115-16, will not be offered local-into-local satellite service that could be available absent the forced carriage of unpopular independent broadcast stations in large local markets.

IV. COMPETITION IN THE MULTICHANNEL VIDEO PROGRAMMING MARKET

As of June 2000, the FCC found that satellite carriers serve only 15.4 percent of the nation's multichannel video programming households, while cable operators serve 80.2 percent of such households. FCC Seventh Annual Report ¶¶ 6-9, 168, A127, A131. "A total of 84.4 million households subscribe to multichannel video programming services," giving such services 83.8 percent of the nation's television households. *Id.* ¶ 6, A127. The remaining households receive television solely through over-the-air broadcasts. Thus, cable operators serve 67.2 percent of the nation's 100.8 million television households while satellite subscribers comprise only 12.9 percent of television households. Moreover, most cable operators enjoy a cable monopoly within their franchise area. *See, e.g.,* Senate Report 2, A137 ("under current circumstances, most cable television systems have become

virtually unregulated providers of a monopoly service”). Thus, unlike cable operators, satellite carriers do not enjoy any “bottleneck” or “gatekeeper” control over the delivery of local channels.

Moreover, because satellite television is a national medium, *see* FCC SHVIA Order ¶ 5, A21, satellite carriers, unlike local cable operators, do not compete with local broadcasters for local advertising revenues. And unlike cable system operators, satellite carriers are not “vertically integrated” – that is, they do not own substantial interests in corporate entities that create or distribute video programming. Rather, their primary source of revenue consists of fees paid by subscribers. As a result, satellite carriers have every incentive to offer whatever programming is most popular to consumers in order to increase the number of subscribers.

SUMMARY OF ARGUMENT

For all of the reasons that Congress’ cable must-carry requirement was upheld in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)(“*Turner I*”) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)(“*Turner II*”), SHVIA’s carry-one, carry-all mandate cannot survive First Amendment scrutiny. The cable must-carry provision was an unconditional, across-the-board, content-neutral measure that was designed to protect *all* local broadcast stations from “the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the

viability of broadcast television.” *Turner I*, 512 U.S. at 661. In contrast, SHVIA’s carry-one, carry-all requirement is a conditional, speech-triggered (and thus content-based) restriction enacted with the avowed purpose of favoring small, relatively unpopular “independent” stations by “tying” them to popular network affiliates. Thus, while cable must-carry was designed to protect *all* local broadcast stations from *unfair* competition for cable carriage by bottleneck monopoly operators and their affiliated programming providers, Congress designed SHVIA to protect only *independent* local broadcasters from *fair* competition for satellite carriage with popular, typically network-affiliated broadcasters. SHVIA’s content-based forced-carriage requirement is thus subject to strict scrutiny, which it cannot begin to satisfy.

Indeed, SHVIA’s carry-one, carry-all requirement fails to satisfy even intermediate review, because there is no evidence – let alone “substantial evidence” – demonstrating that it “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary.” *Turner II*, 520 U.S. at 189.

While the stated purpose for the carry-one, carry-all restriction is preservation of free over-the-air television, neither Congress nor the FCC has come forward with any evidence whatever to support the notion that particular local broadcast stations (let alone the broadcast *medium*) will be

endangered if satellite carriers are permitted to refuse them carriage. No such evidence could be adduced given that satellite carriers provide service for only 12.9 percent of the nation's television households.

Nor may the government avoid First Amendment scrutiny by claiming that the carry-one, carry-all restriction is no restriction at all since satellite carriers may avoid it by not carrying any local broadcast stations in a market. The “ ‘unconstitutional conditions’ doctrine holds that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.” *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996)(citation omitted).

Finally, by conditioning receipt of the statutory copyright license upon acceptance of the carry-one, carry-all burden, Congress has unconstitutionally abused its Copyright power. SHVIA's manipulation of copyright law in order to favor particular speakers – independent local broadcasters – at the expense of other speakers is precisely the kind of abuse that led the Framers to grant only “qualified authority, . . . limited to the promotion of advances in the ‘useful arts.’ ” *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

ARGUMENT

I. SHVIA'S CARRY-ONE, CARRY-ALL REQUIREMENT FAILS STRICT SCRUTINY.

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner I*, 512 U.S. at 641. This constitutionally guaranteed autonomy to choose “what to say and what to leave unsaid,” *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 11 (1986)(“*PG&E*”), protects an owner of a bookstore no less than the authors of the books on his shelves. Although the bookstore owner merely decides whose speech he will offer for sale to his customers, his exercise of editorial discretion “fall[s] squarely within the core of First Amendment security.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 570 (1995) (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). And the security of the First Amendment would surely protect a bookstore owner from a government regulation mandating that he stock his shelves with the published works of *all* local authors if he chooses to offer for sale a book by any single local author. So, too, SHVIA’s carry-one, carry-all mandate violates the First Amendment.

A.

.....SHVIA’
S CARRY-ONE, CARRY-ALL REQUIREMENT DIFFERS

FUNDAMENTALLY IN BOTH PURPOSE AND EFFECT FROM THE
CABLE MUST-CARRY MANDATE UPHOLD IN THE *TURNER* CASES.

Central to the First Amendment analysis in this case are the *Turner* cases, in which a five-to-four majority of the Supreme Court upheld, under intermediate First Amendment scrutiny, the constitutionality of the 1992 Cable Act’s so-called “must-carry” provisions, which essentially required cable television system operators to set aside channels for carriage of *all* local commercial and public broadcast stations. Relying heavily on a series of “unusually detailed statutory findings” made after three years of congressional hearings, *Turner I*, 512 U.S. at 646, the Supreme Court held that the Cable Act’s must-carry requirement was an across-the-board, content-neutral measure that was “justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.” *Id.* at 661.

Specifically, Congress found that cable operators had effective bottleneck control over the provision of video programming to over 60 percent of television households.⁶ And given the substantial “vertical

⁶ As noted above, cable operators now serve 80.2 percent of households receiving multichannel video programming, and 67.2 percent of American television households now subscribe to cable television services. See FCC Seventh Annual Report ¶¶ 6, 168, A127, A131.

integration” between cable system operators and producers of cable programming, Congress found that cable operators have powerful economic incentives to exclude from their systems local broadcast stations, whose programming competes for viewers, and thus for local advertising revenue, with that of cable operators’ affiliated programming providers. *Turner I*, 512 U.S. at 632-33, 646-47.⁷ The “overriding congressional purpose” of cable must-carry was thus to prevent cable operators from exploiting their bottleneck monopoly power to the detriment, and likely destruction, of broadcast stations and thereby to preserve free over-the-air television programming for American households unable to subscribe to cable. *Id.* at 647.

SHVIA’s carry-one, carry-all mandate rests on altogether different footing. Satellite carriers do not have bottleneck monopoly power in any market, are not vertically integrated with video programming producers, and do not compete with local broadcast stations for local advertising revenue. Neither Congress or the FCC found, or could have found, otherwise.⁸ SHVIA’s forced-carriage requirement thus had nothing to do with restraining anticompetitive practices by satellite carriers. Rather, Congress’s

⁷ In its most recent report on competition, the FCC has found that cable system operators had ownership interests in 35 percent of all satellite-delivered national programming networks. FCC Seventh Annual Report ¶¶ 173-76, A132-33. Moreover, “nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable [multiple system operator].” *Id.* ¶ 175, A132.

⁸ To the contrary, it is clear that both Congress and the FCC fully grasped the competitive and market realities of the satellite television industry and its differences from the cable industry. *See* Senate Report 2, A137; FCC Seventh Annual Report ¶¶ 6-8, 168, A127, A131; FCC SHVIA Order ¶ 5, A21.

purpose, which is clear from the structure of SHVIA's carry-one, carry-all requirement and is openly acknowledged in the provision's legislative history, was simply to enhance the competitive position of a specific subset of local broadcasters – small, relatively unpopular “independent” stations – through a classic “tying” arrangement. Thus, while cable must-carry was designed to protect *all* local broadcast stations from *unfair* competition for cable carriage by bottleneck monopoly operators and their affiliated programming providers, Congress designed SHVIA to protect only *independent* local broadcasters from *fair* competition for satellite carriage with popular, typically network-affiliated broadcasters.

Under SHVIA, then, a satellite carrier's decision to carry a popular local broadcaster's programming comes with two costs: (1) the amount charged by the wanted local station for retransmission consent, and (2) the burden and expense of committing scarce channel capacity to unwanted stations that are thereby entitled to free access to the carrier's system. This latter cost is not limited, however, to the satellite companies, for the burden of forced carriage on a satellite carrier's channel capacity has the perverse result of limiting the number of local communities in which the carrier is able to offer local broadcast stations. Not only is satellite channel capacity presently restricted by technological constraints,⁹ it is an extremely valuable

⁹ See, e.g., Conference Report 102, A150 (“Because of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their

commodity that is enormously costly to acquire. Thus, even if satellite carriers had sufficient channel capacity to carry all local channels in all markets, they would not do so absent SHVIA's conditional forced-carriage requirement.

Simply put, the inexorable economic result of SHVIA is to guarantee satellite carriage of *all* local broadcast stations in the largest, most populous markets, but to preclude carriage of *any* local broadcasters in smaller markets. By definition, satellite carriers will endure the burden of carrying relatively unpopular, independent local stations only in those markets where that burden is outweighed by the economic benefit of the additional subscribers attracted by popular network-affiliated stations. The inevitable effect of SHVIA, then, is to guarantee the satellite carriage of small independent local stations in large markets, such as New York (24 local stations) and Washington (18 local stations), and to preclude the carriage of *any* local stations – large or small, network affiliates or independents – in mid-sized and small local markets such as Richmond and Norfolk.

Thus, the Cable Act's must-carry mandate and SHVIA's carry-one, carry-all requirement are entirely different measures aimed at entirely different congressional objectives. Indeed, they are almost mirror opposites. Cable must-carry was upheld in the *Turner* cases as a content-neutral

ability to deliver must carry signals into multiple markets.”); FCC SHVIA Order ¶ 139, A78 (“satellite carriers, like cable operators, have limited capacity to add additional channels of programming[, and]

measure designed to prevent bottleneck monopoly cable operators from distorting the market for ideas by denying local broadcasters fair and competitive access to cable subscribers. As the Court put it: “The First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communications, the free flow of information and ideas.” *Turner I*, 512 U.S. at 657. In SHVIA, however, Congress itself employed a familiar anticompetitive device to achieve an openly anticompetitive objective: to ensure that small independent local broadcasters do not have to compete with network-affiliated stations for access to satellite subscribers. Far from preventing private anticompetitive practices from distorting “the free flow of information and ideas,” SHVIA uses an anticompetitive practice for the avowed purpose of distorting an otherwise free market for ideas.

The forced-carriage provisions of the Cable Act and SHVIA are different in one additional, crucial respect. As noted earlier, the Supreme Court determined in *Turner I* that the Cable Act’s must-carry provisions were content-neutral and thus subject to the intermediate standard of scrutiny set forth in *United States v. O’Brien*, 391 U.S. 367 (1968).

SHVIA's carry-one, carry-all regime, however, is content-based, as we demonstrate below.

B. SHVIA'S CARRY-ONE, CARRY-ALL
REGIME IS SUBJECT TO STRICT SCRUTINY.

Laws that single out elements of the press, like SHVIA, are “always subject to at least some degree of heightened First Amendment scrutiny. *Turner I*, 512 U.S. at 640-41.¹⁰ As this Court has noted, *Turner I* outlined “a two-step inquiry to be undertaken in determining whether a regulation is content-neutral.” *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996). Initially, “the plain terms of the regulation” must be examined to determine “whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates.” *Id.* If that inquiry is inconclusive, the court “then must determine whether . . . the regulation’s ‘manifest purpose is to regulate speech because of the message it conveys.’ ” *Id.* (quoting *Turner I*, 512 U.S. at 645). And a statute’s manifest purpose, if not explicit, can be discerned from its “design and operation.” *Id.* For

¹⁰ The relaxed First Amendment scrutiny applied to over-the-air broadcasters in *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), on the basis of findings concerning the scarcity of over-the-air frequencies, does not apply to satellite television. Neither Congress nor the FCC has made any findings regarding satellite spectrum scarcity or attempted to justify SHVIA must-carry under a *Red Lion* rationale. Moreover, the Supreme Court has consistently declined to reaffirm *Red Lion* or to extend its reasoning to any other communicative medium, including cable. *Turner I*, 512 U.S. at 638-40 (noting that “courts and commentators have criticized the scarcity rationale since its inception,” and refusing to extend it to cable television). The D.C. Circuit has held otherwise, *see Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh’g denied*, 105 F.3d 723 (D.C. Cir. 1997), but Judge Williams (joined by four other Circuit Judges) persuasively demonstrated the error in that decision, arising from the fact that satellite television “is not subject to anything remotely approaching the ‘scarcity that the Court found in conventional broadcast in 1969’ ” 105 F.3d at 724.

precisely the same reasons that this two-step inquiry satisfied the *Turner I* Court that cable must-carry is content-neutral, it is manifestly clear that SHVIA's carry-one, carry-all regime is content-based, and therefore subject to strict judicial scrutiny.

1. SHVIA's Text and Structure Make Clear That Its Forced-Carriage Requirement Is Content-Based.

The Court in *Turner I* emphasized that while the cable must-carry mandate, on its face, plainly interferes with the cable operator's constitutionally protected editorial discretion, "the extent of the interference does not depend upon the content of the cable operators' programming." *Turner I*, 512 U.S. at 644. As the Court explained, "[t]he rules impose obligations upon all operators, . . . regardless of the programs or *stations they now offer or have offered in the past*. Nothing in the Act imposes a restriction, penalty or burden by reason of the views, programs, or *stations the cable operator has selected or will select*." *Id.* (emphases added). A cable operator, therefore, cannot avoid its must-carry obligation "by altering the programming it offers to subscribers." *Id.* The cable must-carry mandate was thus distinguishable from the "right-of-reply" regulation struck down as a content-based restriction on editorial discretion in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

SHVIA's carry-one, carry-all obligation, in contrast, is on its face entirely dependent upon "the stations the [satellite] operator has selected or will select." SHVIA imposes a *conditional* forced-carriage requirement that is based solely on the content of the satellite carrier's menu of station offerings; it applies if, and only if, the satellite carrier offers the programming of one or more local broadcasters in that market. A satellite carrier, therefore, can avoid SHVIA's forced-carriage requirement "by altering the programming it offers to subscribers." *Turner I*, 512 U.S. at 644. In the Washington market, for example, where both Echostar and DIRECTV now offer the programming of the four network-affiliated local stations pursuant to retransmission consent agreements, SHVIA will require on January 1, 2002, that satellite carriers either provide free carriage to the remaining 14 unwanted Washington stations or eliminate from their menus the four network-affiliated stations currently offered.

SHVIA's conditional forced-carriage requirement is thus materially indistinguishable from the right-of-reply statute at issue in *Tornillo*, which required newspapers that criticized political candidates to provide the candidate space for rebuttal. Because a newspaper's statutory obligation "to grant access to the messages of others" was triggered by the content of the newspaper, the Court struck it down as an impermissible content-based "intrusion on newspaper's 'editorial control and judgment.'" *Turner I*, 512

U.S. at 653 (quoting *Tornillo*, 418 U.S. at 258). Moreover, the right-of-reply statute would inevitably operate to deter newspapers from speaking about political candidates in the first place: editors may conclude that “ ‘the safe course is to avoid controversy,’ and by so doing diminish the free flow of information and ideas.” *Turner I*, 512 U.S. at 656 (quoting *Tornillo*, 418 U.S. at 257). When conditionally triggered by speech, a government-mandated “right of access *inescapably* ‘dampens the vigor and limits the variety of public debate.’ ” *PG&E*, 475 U.S. at 10 (quoting *Tornillo*, 418 U.S. at 257) (emphasis added by *PG&E*). For this reason, the Supreme Court has cautioned that a rule requiring a television station to permit *all* political candidates to participate in a televised debate if major party candidates are invited will inevitable reduce speech because the broadcaster “might choose not to air candidates’ views at all.” *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 681 (1998).

Here, “[f]aced with the penalties that would accrue” under SHVIA if it decides to carry one or more local broadcasters, a satellite carrier “might well conclude that the safe course” is not to carry any local stations. Indeed, as discussed earlier, there is simply no doubt whatsoever that satellite carriers will do precisely that in every market in which the economic benefits of carrying popular local stations do not outweigh the economic costs of carrying the unwanted less popular local broadcasters. SHVIA’s

conditional forced-carriage requirement, then, is entirely different in purpose and effect from the Cable Act's unconditional, must-carry mandate, and it is materially indistinguishable from the content-based right-of-reply statute invalidated in *Tornillo*.

Indeed, SHVIA imposes a far greater burden on editorial discretion than the statute at issue in *Tornillo*. Requiring a newspaper to print a political candidate's reply obviously would not *displace* any other speech that would otherwise appear in the newspaper. Accordingly, the right-of-reply statute did not infringe on the newspaper's right to print whatever it otherwise would have printed, while adding the candidate's reply. In contrast, a satellite carrier's channel capacity is technologically and economically a "zero-sum game"; forced carriage of unwanted local broadcasters will inevitably result in the exclusion in other markets of popular local stations that a satellite carrier otherwise would have offered. Indeed, popular network affiliates in medium and small markets are, in fact, doubly burdened. They will inevitably be excluded from satellite carriage in certain markets, both (1) because the channels that would otherwise have been available but for SHVIA in smaller markets will be consumed by the government-preferred independent stations in the larger markets and (2) because the economic benefits to the satellite carrier of offering popular network affiliates in smaller markets will be outweighed by the cost of

carrying, in obedience to SHVIA, less popular independent local stations in the same market.

Thus, quite apart from SHVIA's infringement on the constitutionally protected editorial discretion of satellite carriers, the carry-one, carry-all mandate likewise violates the First Amendment rights of popular local broadcasters that are displaced from satellite carriage to make room for government-preferred stations. In this regard, SHVIA's conditional forced-carriage regime again contrasts sharply with cable must-carry. In *Turner I*, the Court rejected the claim that cable must-carry should be subjected to strict scrutiny because it benefits only local broadcast stations. In determining that the must-carry mandate is content neutral with respect to its beneficiaries, the Court emphasized the requirement's across-the-board application: "The rules benefit *all* full power broadcasters who request carriage – be they commercial or noncommercial, independent or network affiliated" 512 U.S. at 645 (emphasis added). SHVIA, however, selectively benefits only those local broadcasters, typically independent stations, with insufficient viewer demand to warrant satellite carriage in a genuinely competitive market, at the expense of popular local stations, typically network affiliates, that are consequently displaced from satellite carriage in other markets.

In sum, for the same reasons that the Cable Act's must-carry mandate is not content-based, SHVIA's conditional forced-carriage regime plainly is. But quite apart from the teaching of *Turner I*, there can be no doubt that SHVIA's conditional forced-carriage requirement is content-based, for it turns entirely on whether the satellite carriers programming menu contains certain content – the signal of at least one local broadcast station.¹¹ A broadcast station's identity is in every material respect defined by the content of its programming, as the *Turner I* Court implicitly acknowledged when it made clear that “the content of the cable operator's programming” consists of “the programs or *stations* they now offer.” 512 U.S. at 644 (emphasis added). The content of a broadcaster's programming is what determines the station's popularity among viewers in its market, which in turn is what determines a satellite carrier's interest in offering the station's programming to its existing and potential subscribers. Given that a broadcast station's popularity among viewers is determined by the content of its programming, a regulatory condition that is inescapably based on the relative viewer demand for the programming of local broadcasters is, *a fortiori*, inescapably based on the content of that programming.

¹¹ To be sure, SHVIA, unlike the right-of-reply statute invalidated in *Tornillo*, is viewpoint neutral. But a restriction on speech that is content-based, albeit viewpoint neutral, is nonetheless subject to strict First Amendment scrutiny. See, e.g., *Arkansas Educ. Television Comm'n, supra*; *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (“Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign.”); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (classifying as content-based regulations banning picketing except for labor disputes).

2. The Manifest Purpose of SHVIA's Conditional Forced-Carriage Requirement Makes Clear that It Is Content-Based.

The Court in *Turner I*, having determined that the Cable Act's must-carry provision was by its terms content-neutral, looked next to whether the regulation's "manifest purpose is to regulate speech because of the message it conveys." 512 U.S. at 645. As previously discussed, the Court found that Congress manifested its purpose in explicit statutory findings. Congress' overriding objective, far from favoring certain programming, was to ensure that cable operators did not use their bottleneck monopoly power to unfairly exclude local broadcast stations from access to cable subscribers. The "design and operation" of the must-carry regime confirmed this central purpose, for it effectively applies to all cable operators and all local broadcasters irrespective of the content of their programming.

Though not expressed in explicit statutory findings, the manifest purpose of SHVIA's carry-one, carry-all regime is nonetheless clear. As the Conference Report for SHVIA candidly acknowledges, Congress' avowed purpose in conditioning the *voluntary* carriage of *wanted* local stations on the *forced* carriage of *unwanted* local broadcasters was to

prevent[] satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. . . .

Although the conferees expect that subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service, *the Conference Committee is less sanguine that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations.*

Conference Report 101-02, A149-50 (emphasis added).¹²

This congressional purpose is further confirmed by the structure and operation of the “tying” arrangement that Congress crafted to accomplish its objective. Thus, as noted earlier, far from seeking to prevent private anticompetitive practices from distorting “the free flow of information and ideas” (as with the cable must-carry mandate), Congress in SHVIA used an anticompetitive tying arrangement for the avowed purpose of restricting the free flow of information in the otherwise genuinely competitive satellite market for ideas.

Indeed, as SHVIA’s Conference Report openly admits, Congress deliberately sought to *deprive* satellite subscribers in some markets of access to local network affiliates that would be offered but for SHVIA. It did so precisely in order to give consumers no choice other than to undertake the extra “trouble and expense” of “install[ing] antennas or subscrib[ing] to

¹² Congress’ intention to force linkage of popular and unpopular broadcasters was equally explicit in floor statements. See, e.g., 145 CONG. REC. H11,818 (daily ed. Nov. 9, 1999) (statement of Rep. Jackson-Lee) (“dish-providers will not be able to carry only those signals that stand to earn them a great deal of profit”).

cable service” to receive the programming of the network affiliates excluded from satellite service – an expense they would not likely “undertake . . . to obtain over-the-air signals from independent broadcast stations.” *Id.* Thus, Congress deliberately sought to deprive satellite subscribers’ in mid-size and small media markets of access to “a multiplicity of information sources” – the programming of local network affiliates – in order to coerce them to obtain that programming through other media, all to benefit independent stations that lack sufficient viewer demand to compete effectively for satellite carriage on their own. Needless to say, government has no legitimate interest in favoring certain smaller, less popular speakers over larger, more popular competitors, as *Turner I* made clear in upholding the Cable Act’s must-carry requirement precisely because it essentially applied uniformly to *all* cable operators in order to benefit *all* broadcasters. *Turner I*, 512 U.S. at 645.

The Supreme Court has consistently held that a policy of restricting or deterring the speech of “large” or “wealthy” speakers in order to “ ‘enhance the relative voices’ of smaller and less influential” speakers “contradicts basic tenets of First Amendment jurisprudence.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978); *cf. FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (invalidating law which “singles out noncommercial broadcasters” for special speech burden). Indeed, SHVIA’s

burden on satellite carriage of local network affiliates to aid independent broadcasters is strikingly reminiscent of Congress' discredited effort to help less popular political candidates by restricting the expenditures of better financed candidates.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court struck down campaign expenditure limits designed to address Congress' concern that the greater access of wealthier candidates to the media restricted the access of smaller candidates to scarce television advertising and the like. *See id.* at 17, 25-26, 48, 53-54, 56-57. In enacting SHVIA, Congress was similarly concerned that unfettered competitive access by local network affiliates to satellite carriage would "effectively prevent[] many other local [independent] broadcasters from reaching potential viewers." Conference Report 101, A149. But, as in *Buckley*, Congress may not burden the speech of more popular network affiliates (or a satellite carrier's editorial discretion to offer such local broadcasters) in order to enhance the speech of less popular independent stations, for "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

As the *Turner I* Court noted, government action selectively favoring certain smaller voices is inescapably content-based, unlike across-the-board

measures designed to aid *all* candidates or *all* broadcast stations. “Because the expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech.” *Turner I*, 512 U.S. at 658 (citing *Buckley*, 424 U.S. at 17). Indeed, “were the expenditure limitation unrelated to the content of expression, there would have been no perceived need for Congress to ‘equalize the relative ability’ of interested individuals to influence elections.” *Id.* (quoting *Buckley*, 424 U.S. at 48).

So too here. SHVIA’s tying arrangement, ensuring that local independent stations do not have to compete for satellite carriage with more popular network affiliates, is necessarily content-based. For, as in *Buckley*, if SHVIA’s preference for satellite carriage of independent broadcasters truly were “unrelated to the content of [their] expression,” their access could not be perceived as furthering the goal of “improving” or “diversifying” programming. “Even under the degree of scrutiny that [the Supreme Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.” *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 193-94 (1999).

Finally, the fact that the benefits and burdens of SHVIA's conditional forced-carriage requirement are targeted at competing speakers demonstrates, at a minimum, that it is "structured in a manner that carries the *inherent risk* of undermining First Amendment interests." *Turner I*, 512 U.S. at 661 (emphases added). The *Turner I* plurality found that the Cable Act's neutral must-carry provision avoided this danger only because it "appl[ied] to almost *all* cable systems" and "benefit[ed] *all* full power broadcasters irrespective of the nature of their programming." *Id.* at 661, 648 (emphases added). It was for this reason that the cable must-carry provisions did "not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star*" and similar cases. *Id.* at 661 (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585-92 (1983)). The *Minneapolis Star* regulation, while facially neutral, effectively imposed a tax burden on large press outlets but not on smaller ones, and this differential financial burden was subject to strict scrutiny because it "threatened to 'distort the market for ideas.'" *Id.* at 660 (quoting *Leathers*, 499 U.S. at 448). Like the *Minneapolis Star* tax statute, and unlike the Cable Act, SHVIA effectively targets a few large markets for must-carry requirements and does so in order to enhance the competitive position of a select group of speakers within those markets, all at the expense of competing speakers in

those markets and in other markets.¹³ Indeed, SHVIA's carry-one, carry-all regime not only "threatens" to distort the market for ideas, that is its very purpose, as the Act's legislative history candidly acknowledges.

In sum, the content-based nature of SHVIA's carry-one, carry-all requirement is written on its face, is revealed by its purpose, and is a necessary consequence of its operation. Far from protecting the "market for ideas" from distortion by the anticompetitive practices of bottleneck monopolists, SHVIA's tying arrangement itself distorts a genuinely competitive market for ideas – that operated by satellite carriers. It burdens the speech of some broadcasters, and restricts the editorial discretion of satellite carriers, in order to promote the speech of competing broadcasters. SHVIA's preference for the programming of independent local broadcasters is thus a preference *for its own sake*. No asserted government interest – not "diversity," not preserving a "multiplicity of voices" – is compelling enough to save such a naked governmental preference for the speech of a select group of speakers in an otherwise open and competitive market for ideas. For if "[t]he First Amendment's command that government not impede the

¹³ In contrast, cable must-carry benefits local broadcast programmers at the expense of *cable* programmers. *Turner I* found this permissible solely because the preference was "based *only* upon the manner in which speakers transmit their messages." *Turner I*, 512 U.S. at 645 (emphasis added). "Broadcasters . . . transmit over the airwaves" for *free*, while cable is delivered only for a fee, so the broadcast *medium* has "intrinsic value" unrelated to content justifying the preference. *Id.* at 645, 648, 660-61. Thus, the Cable Act's "differential treatment is 'justified by some special characteristic of' the particular medium" being preferred or burdened. *Id.* at 660-61 (quoting *Minneapolis Star*, 460 U.S. at 585). But there is no basis for preferring some speakers within the *same* medium, for it cannot be based on some "special characteristic" of the medium itself. The programming of network-affiliated broadcasters is

freedom of speech,” *Turner I*, 512 U.S. at 657, is not violated by SHVIA’s conditional requirement forcing satellite carriers to offer the speech of independent local broadcasters, then there is nothing to prevent the government from likewise forcing bookstore owners to offer the works of government-preferred authors, to cite just one of countless examples.

II. SHVIA’S CARRY-ONE, CARRY-ALL REQUIREMENT FAILS INTERMEDIATE SCRUTINY.

Even if the carry-one, carry-all restriction could be understood as content-neutral, thereby triggering intermediate scrutiny, *see Turner I*, 512 U.S. at 662, the government cannot satisfy its substantial burden of demonstrating that its restriction “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary.” *Turner II*, 520 U.S. at 189.

The carry-one, carry-all “provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.”

Conference Report 101, A149. Even if one accepts the Conference Committee’s assertion that this objective qualifies as “important” and “unrelated to the suppression of free speech,” *Turner II*, 520 U.S. at 189,¹⁴

Congress has not, and cannot, show that “the recited harms are real, not merely conjectural,” or that the carry-one, carry-all restriction “will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664.

just as free as that of independent broadcasters, so preferring the latter over the former is illegitimate and, by definition, unrelated to any effort to aid the broadcast *medium*.

¹⁴ Congress has not carried its burden of demonstrating the importance of preserving over-the-air broadcast stations. The Conference Committee cited *Turner I*, 512 U.S. at 663, for the proposition that these objectives are sufficiently “important,” *see* Conference Report 101, A149, but the Supreme Court grounded its conclusion there on the fact that “nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming.” *Turner I*, 512 U.S. at 663. Today, only 16.2 percent of the nation’s television households do so, and the percentage continues to decline. FCC Seventh Annual Report ¶ 6, A127 (multichannel video providers (i.e., cable and satellite) served 83.8 percent of television households in June 2000, up 4.4 percent from June 1999). Moreover, as shown above, application of carry-one, carry-all is in fact directly “related to the suppression of speech” in that it effectively prohibits satellite carriers from broadcasting local stations in mid-sized markets such as Richmond.

The Committee argued that the carry-one, carry-all requirement advanced its objective because, it feared, broadcast stations not carried by satellite “would face the same loss of viewership Congress previously found with respect to cable noncarriage.” Conference Report 101, A149.

Congress had no evidence whatever to support this assertion, and even a cursory examination of the stark differences between cable and satellite demonstrates its complete lack of basis. In *Turner II*, the Supreme Court summarized the evidence marshaled by Congress with respect to the effect of cable noncarriage on broadcasters:

[T]here was specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets. Cable served at least 60 percent of American households in 1992, and evidence indicated cable market penetration was projected to grow beyond 70 percent. As Congress noted, cable operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system.

520 U.S. at 197 (citing 1992 Cable Act and legislative history).¹⁵ Even with this undisputed evidence of the substantial market power of cable operators, the question whether “the viability of a broadcast station depends to a material extent on its ability to secure cable carriage” was close in *Turner II*.

Id. at 208. The Court recounted the extensive evidence considered by Congress on both sides of this issue, *id.* at 208-13, and ultimately deferred to Congress’ judgment. Four Justices in dissent found the evidence in the record insufficient to support “summary judgment on whether Congress could conclude, based on reasonable inferences drawn from substantial evidence, that . . . the free local off-the-air broadcast system is endangered.”

Id. at 248 (O’Connor, J., dissenting) (internal quotations and citations omitted).

The question is not close in this case, for satellite carriers provide service for only 12.9 percent of the nation’s television households. *See* FCC Seventh Annual Report ¶¶ 6, 168, A127, A131. Congress adduced no evidence whatever to support the facially implausible proposition that noncarriage to such a small segment of the television market will threaten *any* over-the-air broadcasters, let alone endanger the entire system of free

¹⁵ To be sure, the plurality did not consider this evidence of cable operators’ market power to be sufficient, for it went on to discuss their anticompetitive “incentive to drop local broadcast stations from their systems,” *Turner II*, 520 U.S. at 197, arising from cable operators’ vertical integration with cable programmers and their competition with local broadcasters for local advertising revenues. *Id.* at 198-204. As explained above, satellite carriers possess neither of these anticompetitive incentives because they own no programming interests and cannot compete for local advertising by virtue of the national character of their broadcasting platform.

television in this country. *See Turner II*, 520 U.S. at 222 (“Must-carry is intended not to guarantee the financial health of *all* broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households.”) (emphasis added).

As the D.C. Circuit explained just last month, “*Turner I* demands that the [government] do more than ‘simply posit the existence of the disease sought to be cured.’ It requires that the [government] draw ‘reasonable inferences based on substantial evidence.’” *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner I*, 512 U.S. at 664, 666) (internal citation omitted). Congress has not come close to satisfying this burden in SHVIA; the carry-one, carry-all scheme accordingly does not survive intermediate scrutiny, and must be struck down as contrary to the First Amendment.

IV. SHVIA UNCONSTITUTIONALLY CONDITIONS A SATELLITE CARRIER’S RECEIPT OF A STATUTORY LICENSE ON ITS “AGREEMENT” TO RELINQUISH EDITORIAL CONTROL.

A. EVEN IF A PERSON HAS NO RIGHT TO A GOVERNMENT BENEFIT, THE GOVERNMENT MAY NOT CONDITION IT UPON “AGREEMENT” TO AN INFRINGEMENT OF THE FREEDOM OF SPEECH.

Perhaps recognizing that SHVIA’s speech-triggered carry-one, carry-all scheme cannot withstand First Amendment scrutiny, the Conference Committee asserted that the First Amendment is not implicated here because government-conferred benefits are a matter of legislative grace and no heightened scrutiny applies to laws that merely confer benefits. Conference Report 101, A149. Under this theory, the exercise of editorial discretion by satellite carriers to select the stations they offer to subscribers is not a right, but a government-bestowed privilege. The local-into-local statutory copyright license is an exception to the usual restriction on speech imposed by copyright law, which absent the license would bar satellite retransmission

of broadcast programming as an infringement of the underlying program copyrights. Because the general copyright restriction on satellite carriers' editorial discretion is constitutionally permissible, the argument goes, SHVIA's compulsory license is a privilege that may be conditioned on agreement to provide speech that the *government* believes to be in the public interest.

The Supreme Court has unequivocally rejected the central premise of this analysis:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1972); *see also Umbehr*, 518 U.S.

at 674. Thus, Conference Committee members were “plainly mistaken in their argument that, because a[n] . . . exemption is a ‘privilege’ or ‘bounty,’ its denial may not infringe speech.” *Speiser v. Randall*, 357 U.S. 513, 518 (1958). Indeed, not a single Justice in *Turner I* even deemed this argument worthy of comment when the government advanced it in that case. *See* Brief for the Federal Appellees in *Turner I* at 28, A153.

A satellite carrier's supposedly voluntary “choice” under SHVIA to carry the government's preferred speakers is both illusory and

constitutionally irrelevant. The entire point of the unconstitutional conditions doctrine is that there are some “agreements” that the government is not allowed to extract in exchange for the benefits it offers. For example, when public broadcasting stations applied for federal grants, they “voluntarily” accepted the congressionally imposed condition that they relinquish their right to engage in editorial commentary. Yet the Supreme Court struck down the requirement in *League of Women Voters* as an unconstitutional condition that invaded the stations’ First Amendment rights. And when college students applied for student association monies to pay for the printing costs of their magazine, funds the university conditioned on agreement not to publish religious commentary, the students’ acceptance of that condition on funding was “voluntary,” yet this Court found an unconstitutional condition. *Rosenberger v. University of Virginia*, 18 F.3d 269, 279-80 (4th Cir. 1994), *rev’d on other grounds*, 515 U.S. 819 (1995).¹⁶

Here, Congress’ avowed legislative purpose in conditioning the local-into-local copyright license on carrying all local broadcast signals was to “prevent[] satellite carriers from choosing to carry only [network affiliated] stations.” Conference Report 101, A149. Thus, Congress expressly linked

¹⁶ This Court was reversed by the Supreme Court only because of its next step, holding that the university had a compelling interest to justify the conditional restriction. The Supreme Court rejected that position but did not quarrel with this Court’s application of the unconstitutional conditions doctrine. And of course the result in *Rosenberger* confirmed that the students could not be required to accept a condition on the receipt of student funding which invaded their freedom of speech. 515 U.S. at 834.

the statutory license in the Copyright Act (17 U.S.C. § 122) with the carry-one, carry-all provision in the Communications Act (47 U.S.C. § 338) in order to manipulate the editorial policies of satellite carriers. The “deal” contained in SHVIA gives satellite carriers the “benefit” of a statutory copyright license only if they cede to the government editorial control over which local broadcast signals they will carry.

Our argument is not that the government is required to furnish satellite carriers a statutory copyright license, nor that carriers are entitled to a license on particular terms of their own choosing. Rather, our contention is that if Congress chooses to make a statutory license available, it may not condition availability of that license on terms that require a recipient to cede First Amendment rights. The facile assumption that, because Congress could completely deny the compulsory license, it may condition it on the sacrifice of editorial discretion, is precisely the “ ‘greater-includes-the-lesser’ syllogism” which the Supreme Court has rejected as “little more than a legal sleight-of-hand” that is “blind to the radically different constitutional harms inherent in the ‘greater’ and ‘lesser’ restrictions.” *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 762-63 (1988). A city’s broad power to exclude *all* parades or news racks from public streets or sidewalks does not include the seemingly lesser power to condition these “privileges” on citizens’ “voluntary” agreement to include state-designated speakers in the parade or

news rack. *See Hurley, supra; Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). By the same token, Congress cannot offer to end its copyright restriction on petitioners' speech in exchange for petitioners' sacrifice of their right to exclude government-preferred speakers.

In particular, the receipt by a business of a valuable, discretionary government license or permit does not authorize the government to infringe the recipient's First Amendment rights. In *C&P Telephone*, this Court struck down a statute "prohibit[ing] local telephone companies from offering, with editorial control, cable television services to their common carrier subscribers." 42 F.3d at 185. There, as with SHVIA, the government's target was the carrier's editorial control over its signals. The government argued that "because common carriers have a monopoly benefit conferred upon them, the government has the right to condition continued enjoyment of this benefit upon acceptance of regulation which would ordinarily be deemed violative of the First Amendment." *Id.* at 192. This Court deemed the "underpinnings of this quid pro quo argument" to be "highly questionable," *id.*, and struck down the statutory limitation.

Similarly, in *Bellotti*, the Supreme Court struck down a broad restriction on corporate participation in referendum and initiative contests. The dissent argued that the state could restrict corporate speech because the corporation's very existence and the special legal advantages it enjoyed were

all matters of legislative grace. 435 U.S. at 809-10 (White, J., dissenting). The Supreme Court flatly rejected this “bitter with the sweet” argument, holding that while the legal privileges of corporate organization might well be benefits the state was free to grant or withhold, the state was not “free to define the rights of their creatures without constitutional limit.” *Id.* at 778 n.14.

Likewise, in *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), the court struck down FEC regulations mandating that corporate and union election voter guides devote the same prominence and space to all candidates. The court observed that analogous “must carry” rules were upheld as applied to cable TV monopolies only because of the “unique control” that they have as bottlenecks over public access to programming. *Id.* at 1314 (citing *Turner I*). The First Circuit noted that the FEC could argue that it had not compelled speech as such; it had merely said that these must-carry rules apply if a corporation wants to publish voter guides using its general treasury funds, and Congress could constitutionally have prohibited corporations from engaging in these activities except through segregated funds. “Yet the doctrine of unconstitutional conditions limits the government’s ability to make someone surrender constitutional rights even to obtain an advantage that could otherwise be withheld. Here, a surrender of such rights is being required in order to do something — to publish

political information about voting guides or records — that Congress has not made unlawful.” *Id.* at 1315 (internal citations omitted).

The “legislative grace” argument was also rejected in *PG&E*, where the Supreme Court struck down a regulation compelling electric utilities to carry other groups’ newsletters in the billing envelopes mailed to customers. Again, the dissent argued that a corporation’s constitutional interest in not being forced to transmit the speech of third parties was “de minimis,” and this was “especially true in the case of PG&E, which is after all a regulated public utility.” 475 U.S. at 34 (Rehnquist, J., dissenting). A majority disagreed. Although a state enjoys “substantial leeway” in regulating corporations, there is nothing to suggest “that the State is equally free to require corporations to carry the messages of third parties.” *Id.* at 16 n.12. The Court likewise rejected out of hand the suggestion that PG&E’s First Amendment rights had been voluntarily surrendered to state regulation when it accepted the state’s offer of the benefits of a monopoly license. *Id.* at 17 n.14 (citations omitted).

Indeed, the *PG&E* Court recognized that the dissent’s argument knew no stopping point. If a company’s acceptance of a state license left it vulnerable to a state decision to commandeer the “extra space” in the utility’s billing envelopes for assignment to third parties whose voices the state wished to be heard, then every “regulated business” benefiting from a

state license or permit would be equally subject to such impositions. *Id.* at 18 n.15. “‘Extra space,’” the Court observed, “exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles. Under the Commission's reasoning, a State could force business proprietors of such items” to become conduits for the speech of third parties favored by the state by the simple expedient of making agreement to carry such messages the price of obtaining a state-sanctioned license. *Id.*

Something worse—and more patently unconstitutional—has happened here. SHVIA treats satellite carriers’ channel capacity as spare space that Congress, wielding influence through conditional grants of copyright licenses, is free to fill up with the speech it wants to preserve—the voices of local independent broadcasters whose programming lacks sufficient market appeal to ensure them carriage by a satellite service. But unlike in *PG&E*, Congress’ preferred speech in this case displaces not empty space, but channels that satellite carriers would utilize for speech that their subscribers prefer over that mandated by Congress.

B. SHVIA’S CARRY-ONE, CARRY-ALL REGIME CANNOT BE
EXCUSED AS AN EXERCISE OF CONGRESSIONAL SPENDING
POWER.

Relying primarily on *Rust v. Sullivan*, 500 U.S. 173 (1991), the Conference Committee argued that SHVIA’s carry-one, carry-all restriction is subject to rational basis scrutiny because statutory copyright licenses are “in the nature of subsidies to satellite carriers.” Conference Report 101, A149. This “subsidy” argument is misconceived.

1. The Statutory Copyright License Is Not a Government Subsidy.

The statute at issue in *Rust*, a provision barring recipients of federal grants from using the funds to finance abortion counseling, was a straightforward exercise of the congressional “*spending power*.” 500 U.S. at 197 (emphasis added). The government was “not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized.” *Id.* at 196.¹⁷ In contrast, SHVIA’s statutory copyright license does not confer a government subsidy under Congress’ spending power. The Supreme Court has consistently drawn a distinction between laws that directly finance the government’s own speech under the spending power, which enjoy substantial judicial deference, and laws that “regulate[] any First Amendment activity” under one of Congress’ regulatory powers (here, the Copyright power), which are subject to exacting judicial scrutiny. *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983).

The statutory copyright license—a government exemption from a governmentally imposed restriction on speech—is a regulation, not a subsidy. The statutory license does not involve the distribution of government funds, tax exemptions, jobs, or property. In contrast, the

copyright laws are direct regulations of speech (albeit constitutionally permissible restrictions if kept within proper, content-neutral bounds). *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985). Absent the congressional limitation created by the copyright laws, petitioners would be free to retransmit any broadcast programming in any market without anyone's permission, as cable companies could prior to the 1976 copyright amendments. *See Teleprompter Corp. v. CBS*, 415 U.S. 394, 408-10 (1974). After those revisions, however, cable retransmission without a license became an "infringement" of the copyrights held by those who create the content aired by broadcasters.

Congress itself has recognized that its 1976 revision to the copyright law had created "*statutory* impediments to direct-to-home satellite service." Senate Report 6, A141 (emphasis added). It would be utterly impossible for satellite carriers to negotiate individually with thousands of holders of copyrighted work aired by a local broadcast station.¹⁷ Thus, Congress understood that "[s]atellite television companies are *prohibited* . . . from providing their subscribers with signals from local television stations as a component of their satellite television service." *Id.* at 3, A138 (emphasis

¹⁷ The other First Amendment case cited by the Conference Committee also simply confirmed Congress' "wide latitude to set *spending priorities*." *NEA v. Finley*, 524 U.S. 569, 588 (1998) (emphasis added).

¹⁸ This practical impossibility arises from the broadcast industry's general practice of not obtaining all the rights and licenses necessary to enable a satellite carrier to retransmit their programming. Thus, a satellite carrier could not simply enter into a retransmission contract with the station that would

added). Since SHVIA's statutory copyright license is a suspension of a government restriction on speech, it cannot rationally be characterized as a subsidy of speech. No case remotely endorses the notion that the government "subsidizes speech" when it merely refrains from prohibiting it.

Indeed, the property at stake is *not* the government's property, but the private property of others—that is, the intellectual property of the artists and producers who own copyrights on the programs carried by local broadcast stations. SHVIA does not offer *government* subsidies—it manipulates copyright law to induce one private party to support another. SHVIA licenses A (satellite carriers) to override B's (the programming producers') property rights on the condition that A give something of value (retransmission into local markets) to C (local independent stations whose programming is not in sufficient demand). SHVIA's conditional forced-carriage regime is materially indistinguishable, as noted earlier, from a law granting to bookstore owners a statutory copyright license on all books by local authors, but conditioning the sale of any local author's work on the bookstore's agreement to stock its shelves with the works of all local authors, no matter how unpopular with customers.

SHVIA's carry-one, carry-all requirement—which is, after all, codified not with the Copyright Act but with the Communications Act—is in

clear it of all copyright infringement liability. See U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 24-25 (1997), A176-77.

no real sense a regulation of copyright licenses. Its avowed purpose is to encroach on the editorial freedom of satellite carriers in order to enhance the competitive position of the independent local stations that Congress has singled out for special solicitude. It is no answer to suggest that the promotion of local independent stations is a legitimate government interest, for there is no nexus between that interest and the purposes of copyright law.

The Supreme Court has held in the analogous context of the Takings Clause that there must be an “ ‘essential nexus’ . . . between the ‘legitimate state interest’ and the permit condition exacted” by the government. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). The government’s “assumed power to forbid” something outright—such as the power to forbid infringement of a copyright—includes *only* the “power to condition . . . upon some concession” that “serves *the same end*.” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836 (1987) (emphasis added). The “lack of nexus between the condition and the original purpose of the . . . restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining” of some concession the government seeks. *Id.* at 837 (citation omitted). The “absence of a nexus” between copyright law and the carry-one, carry-all provision of SHVIA leaves Congress “in the position of simply trying” to usurp satellite carriers’ editorial freedom and to ensure carriage of local independents “through

gimmickry, which converted a valid regulation” of copyright licenses “into ‘an out-and-out plan of extortion.’ ” *Dolan*, 512 U.S. at 387.

2. Even if the Statutory Copyright License Is a Subsidy, the Carry-

One, Carry-All Restriction Is An Unconstitutional Condition.

Even if SHVIA’s statutory license qualifies as a government subsidy analogous to the federal financial aid in *Rust*, coupling it with the forced-carriage requirement would nonetheless plainly be an unconstitutional condition because it impermissibly leverages that aid to coerce the sacrifice of free speech rights, in the manner condemned by the Supreme Court in *League of Women Voters*. The dissent in that case argued that Congress was free to tie any conditions it liked to the receipt of public funds, including restrictions on “editorializing” by the public broadcaster receiving those funds. *League of Women Voters*, 468 U.S. at 403 (Rehnquist, J., dissenting). The majority saw it differently.

What the dissent characterized as a free choice by the recipient to forego speech in exchange for public funds, the Court condemned as an outright “ban” on editorializing by the recipient. *Id.* at 381, 383, 384. The Court expressly rejected the notion that Congress’ spending power allowed it to condition a media company’s receipt of public funds on surrender of its

editorial freedom. *Id.* at 399-400; *see also Rust*, 500 U.S. at 197 (discussing *League of Women Voters*).¹⁹

Just as Congress may not condition its grant of funds on the station waiving its constitutional right to editorialize, so too here Congress may not condition the license on satellite carriers' waiving their constitutional right to exercise editorial discretion. It will not suffice to argue that Congress is entitled to define the scope of its licensing programs, for "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Services Corp. v. Velazquez*, 121 S. Ct. 1043, 1052 (2001).

Moreover, SHVIA's forced-carriage condition on the statutory copyright is not a narrowly tailored effort to refrain from subsidizing activity the government would rather not finance. To the contrary, it is a broad proscription that withholds the entire benefit – the right to provide local-into-local service in a market – for the failure to succumb to the government's carry-one, carry-all demand; it provides no alternative avenue to exercise the constitutionally protected activity while continuing to receive the government benefit. Like the public broadcaster in *League of Women*

¹⁹ Furthermore, the Supreme Court invalidated that abuse of the spending power even though the statute at issue in *League of Women Voters* was subject to the relaxed *Red Lion* standard applicable to over-the-air broadcasters. 468 U.S. at 377. Outside the broadcast field, it is well-settled that Congress may not condition even a direct subsidy on the recipient's "agreement" to restrict speech that the recipient funds with its own resources. As explained above, the "scarce spectrum" principle of *Red Lion* is inapplicable to satellite regulation.

Voters and the lawyers in *Velazquez*, but unlike the plaintiffs in *Rust* and *Regan*, the unconstitutional condition here results in a *complete* deprivation of the relevant First Amendment freedom, because there is no alternative avenue for satellite carriers to engage in their constitutionally protected activity of editorial control over their satellite transmission spectrum.

The plaintiffs in *Rust* and *Regan* could receive the government aid and still engage in abortion counseling or lobbying through affiliated programs not receiving government financial support. *Rust*, 500 U.S. at 196-97; *Regan*, 461 U.S. at 544, 546. Those plaintiffs were not put to the Hobson's Choice of declining the benefit or sacrificing constitutional rights; they could both take the benefit and exercise the constitutional right through an alternative avenue. In contrast, the broadcast station in *League of Women Voters* obviously could not editorialize through a separate organization; the station could only editorialize over the airwaves licensed to it. Similarly, without the statutory copyright license, satellite carriers "would face virtually insurmountable technical and logistical problems if they were required to block out all programs as to which they had not directly obtained copyright permission from the owner." *Capital Cities Cable*, 467 U.S. at 710 n.13 (cable statutory license). Satellite carriers can only exercise their editorial discretion over the spectrum they own — the spectrum that SHVIA would overpopulate with local broadcasters that subscribers do not want and

petitioners therefore do not wish to carry. Thus, unlike *Rust* and *Regan*, but like *League of Women Voters* and *Velazquez*, the condition here deprives the “recipient of the subsidy” of *any* ability to engage in the constitutionally protected activity, “thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *Rust*, 500 U.S. at 197 (emphasis in original).

Finally, the Supreme Court explained earlier this year that the teaching of *Rust* is limited to “instances in which the government is *itself* the speaker, or instances . . . in which the government used private speakers to transmit information pertaining to *its own* program.” *Velazquez*, 121 S. Ct. at 1048 (citations omitted; emphases added). *Rust* does not shield speech restrictions that accompany subsidies related to *private* speech. In holding that speech restrictions on Legal Services Corporation funding violated the First Amendment, the Court emphasized that “the salient point is that . . . the LSC program was designed to facilitate private speech, not to promote a governmental message.” *Id.* at 1049. This fact served to distinguish the LSC funding condition from that “upheld in *Rust*, and to place it beyond any congressional funding condition approved in the past by [the Supreme] Court.” *Id.* at 1052. The speech implicated in this case — both the video programming and the satellite carriers’ editorial control over it — is

indisputably private, not governmental, and thus outside the narrow ambit of *Rust*.

In *Velazquez*, the Court found it particularly troubling “that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.” 121 S. Ct. at 1049. The Court explained its decision in *League of Women Voters* as holding that “[t]he First Amendment forbade the Government from using [broadcast stations] in an unconventional way to suppress speech inherent in the nature of the medium.” *Id.*; see also *Rosenberger*, 515 U.S. at 828 (“government regulation may not favor one speaker over another” and the government may not create regulatory exemptions in order to “manipulate the public debate”). These principles apply with equal force to SHVIA, in that Congress has “distort[ed the] usual functioning,” *Velazquez*, 121 S. Ct. at 1049, of the satellite television medium by altering the programming that, absent the carry-one, carry-all scheme, would be demanded by viewers and provided by satellite operators. Indeed, SHVIA directly contravenes “the right to use editorial judgment to exclude certain speech so that the broadcast message could be more effective.” *Id.* at 1049. The editorial choice that SHVIA gags is “speech necessary to the proper functioning of those systems” of satellite communication. *Id.* at 1050.

The ramifications of judicial approval of SHVIA's *quid pro quo* would be dramatic. If a copyright license can be granted or withheld on the condition that the recipient cede editorial freedom to Congress, then the entire statutory framework of copyright licenses and exemptions could be transformed into a juggernaut for invasion of the First Amendment rights of all who make use of copyrighted material. Examples abound:

- The “fair use” privilege of quoting copyrighted works under 17 U.S.C. § 107 could be conditioned on an author’s agreement to quote a work showing an opposing viewpoint. Copyrighted works by Holocaust historians could be quoted only if works by Holocaust revisionists were quoted as well.
- The license exempting hotels from the ban on secondary transmission in order to allow them to transmit TV programs to guests, 17 U.S.C. § 111(a)(1), could be conditioned on the hotel’s agreement to transmit the broadcasts of all local stations, all religious broadcasters, etc.
- The exemption permitting archives to reproduce copies of audiovisual news programs, 17 U.S.C. § 108(f)(3), could be conditioned on the archives’ agreement to stockpile copies of all news programs, rather than just those programs the archivists deem of interest to their patrons.
- The photocopy exemption allowing libraries to make isolated copies for library patrons for the purposes of study, 17 U.S.C. § 108, could be conditioned on their agreement to furnish copies of speech or speakers that, like the independent local stations here, Congress believes should be preserved and made available to—indeed, foisted upon—a wide audience.
- The exemption allowing teachers to make copies for classroom use, 17 U.S.C. § 107, could be conditioned on the teacher’s agreement to copy and furnish to her students all authors and viewpoints available on a particular subject matter.

There is no material distinction between these hypothesized abuses of the Copyright Power (and the First Amendment) and what Congress has done in SHVIA. In each instance, as in this case, a copyright license that Congress is free to eliminate entirely is conditioned upon communication by the licensee of speech favored by Congress.

IV. THE
CARRY-ONE, CARRY-ALL REQUIREMENT UNCON-
STITUTIONALLY ABUSES CONGRESS' COPYRIGHT POWER.

The purpose of the copyright laws is “To promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” U.S. CONST., Art. I, § 8, cl. 8. This Clause “is both a grant of power *and a limitation*. This qualified authority . . . is limited to the promotion of advances in the ‘useful arts.’ It was written against the backdrop of the practices . . . of the Crown in granting monopolies to court favorites.” *Graham*, 383 U.S. at 5 (emphasis added).

The Copyright Clause’s limited authority to grant copyright monopolies is an artifact of the Framers’ general “abhorrence” of and “instinctive aversion” to government-granted monopolies. *Id.* at 7-8. It was, after all, a royal abuse of monopoly power (with respect to tea) “that sparked the revolution,” *id.* at 7, and the Framers’ particular concern was that congressional power over patents and copyrights not be wielded to favor or support some individuals over others. *Sears, Roebuck & Co. v. Stiffel*

Company, 376 U.S. 225, 229 (1964) (patents and copyrights “are not given as favors, as was the case of monopolies given by the Tudor monarchs”).

The copyright laws achieve their goal of “increas[ing] . . . the harvest of knowledge” by granting temporary exclusive rights that “assure contributors to the store of knowledge a fair return for their labors.” *Harper & Row*, 471 U.S. at 545-46; *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994). “The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Congressional power to grant monopoly privileges is limited by this purpose and may not be exercised “to provide a special private benefit.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Such favoritism is not germane to copyright law; indeed, it is an abuse of the congressional copyright power. Congress “may not overreach the restraints imposed by the stated constitutional purpose.” *Graham*, 383 U.S. at 6. “This is the standard expressed in the Constitution and it may not be ignored.” *Id.*

SHVIA’s carry-one, carry-all requirement, designed to coerce satellite carriers into retransmitting the signals of a particular class of local broadcasters favored by Congress at the expense of programming demanded by consumers in a free market, is antithetical to the Framers’ conception of

the Copyright power. The purpose of copyright law is not to promote *particular, government-favored* voices, artists, or programs, but to encourage *all* creative endeavors. SHVIA subverts this end by granting satellite carriers local-into-local copyright licenses as an inducement for those carriers to carry the independent broadcast stations that are Congress' special wards.

It is one thing for Congress to grant statutory copyright licenses that modify an artist's monopoly rights in order to balance the competing public goals of encouraging creative work, promoting broad public availability of the arts, and accommodating the need for reasonable and fair use of artistic works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Fogerty*, 510 U.S. at 526; *Harper & Row*, 471 U.S. at 549. But it is another thing entirely to manipulate copyright licenses to serve the wholly unrelated ends of SHVIA's carry-one, carry-all requirement — especially when the copyright law is being perverted in the name of the sort of governmental favoritism that led the Framers to cabin congressional copyright power in the first place. The Constitution's grant of copyright power was restricted precisely to prevent Congress from abusing the power by selecting and promoting its favorites. *Graham*, 383 U.S. at 5.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should declare that 47 U.S.C. § 338 and the FCC regulations implementing it violate the United States Constitution and, for that reason, enter an order setting aside the FCC's regulations implementing the carry-one, carry-all regime.

APPENDIX C

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals)	
)	
Amendments to Part 76)	
of the Commission's Rules)	
)	
Implementation of the Satellite Home)	
Viewer Improvement Act of 1999:)	
)	
Local Broadcast Signal Carriage Issues)	CS Docket No. 00-96
)	
Application of Network Non-Duplication,)	CS Docket No. 00-2
Syndicated Exclusivity and Sports Blackout)	
Rules to Satellite Retransmission of)	
Broadcast Signals)	

**COMMENTS OF THE SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION TO FURTHER NOTICE OF
PROPOSED RULEMAKING**

The Satellite Broadcasting and Communications Association (SBCA) is pleased to submit its comments to the Commission in the above-referenced rulemaking. The SBCA is the national trade association that represents the various industry sectors that are engaged in the delivery of television, radio and broadband services directly to consumers via satellite. The members of the Association include the Direct Broadcast Satellite (DBS) carriers and distributors that provide television programming and broadband service directly to consumers; the programming services that offer entertainment, news and sports to consumers over satellite platforms; satellite equipment manufacturers and distributors; and satellite dealers and retail firms that sell systems directly in the consumer marketplace. At present, United States DBS operators serve more than 15 million households.

A principal focus of the *Further Notice* is the so-called “dual carriage” issue with regard to the applicability of the Commission’s must-carry rules during the transition from an analog to a digital broadcast delivery marketplace. The SBCA is vitally concerned over “dual carriage,” as well as the legal grounding of the satellite must-carry regime as a whole.¹

In general, we believe that considering DTV-related issues in the context of satellite carriage at this point is premature despite the best intentions of the Commission. It will not be easy to anticipate the workings and operating rules of the digital landscape - the situation is murky at best. Significant questions abound concerning the development of many of the important components that are necessary for a smooth and consumer-friendly transition. They include whether or not all – or even most - local broadcasters will meet the deadlines imposed by the Commission; assessing the development of satisfactory interfaces for the routing of programming through consumer receiving devices that will suit all distribution technologies; determining the effects of the application, if any, of a copy control regime; and ensuring that the configuration of appropriate consumer electronics equipment is consistent with consumer needs as well as the programming being delivered in the marketplace. None of these important factors shows any sign of resolution in the near future, not to mention five years from now when local broadcasting supposedly becomes fully digital, and current analog spectrum is theoretically returned to the U.S. Government.

¹ The SBCA’s participation in this rulemaking proceeding does not constitute an endorsement of any provision of the SHVIA or a concession that any provision of that statute is enforceable against satellite carriers. SBCA reserves all its rights, including the right to seek judicial evaluation of the constitutionality of any provision of the SHVIA prior to promulgation of any rules or regulations thereunder. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997); *Califano v. Sanders*, 430 U.S. 99, 109 (1997); *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1315 (D.C. Cir. 1996); *Able v. United States*, 88 F.3d 1280, 1288-89 (2nd Cir. 1996). The SBCA also reserves the right to submit additional comments addressing the constitutionality of the SHVIA itself or any proposed rules enforcing SHVIA.

In any event, none of these factors affects the Commission's sound conclusion that dual carriage is inappropriate. The SBCA has already expressed in previous comments filed with the Commission its opposition to any dual carriage requirements.² We have reminded the Commission that there is no statutory authority directing the Commission to impose a dual-carriage regime on DBS satellite carriers. Furthermore, a unilateral decision by the Commission to implement the carriage of both the analog and digital signals of a television broadcaster would run counter to the trends that are rapidly evolving in the television distribution marketplace. Mandating dual carriage would actually be a setback to the development of the competitive environment that is already making even more video choices available to consumers. The Commission must make sure that its policies are positioned to encourage those choices in a free market environment and not delay their potential through the enforcement of obsolete concepts.

Television broadcasters are gaining immense new benefits by virtue of the transition to digital broadcasting. They are receiving, at no cost, valuable new spectrum in what many observers have termed "a giant government giveaway." These new frequencies will enhance the utilization of video compression techniques that will enable broadcasters to multicast within their bandwidths, giving them the opportunity to offer a variety of channels of their choosing to consumers who receive their service. Given these new benefits, they should be required to compete in the marketplace without the special government-granted privileges for protecting their markets. That includes the now archaic and gratuitous benefit of must-carry as well as the obsolete Grade B contour protection.³ We believe that it would be poor public policy to allow a digital television

² Comments of the Satellite Broadcasting and Communications Association in Docket CS 00-96, July 14, 2000, and CS Docket 00-132, September 8, 2000.

³ SBCA participated extensively in the Commission's 1998 proceedings regarding the validity of utilizing Grade B measurement as a realistic indication of television broadcast signal propagation.

broadcaster to operate in a free and competitive market while continuing to enjoy government-mandated privileged access to consumers from which they currently benefit.

For the reasons set forth, the Commission should not pursue a dual must carry obligation for satellite carriers.

SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION

Andrew R. Paul, Senior Vice President

Andrew S. Wright, Vice President & General Counsel

June 11, 2001

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	ET Docket No 98-206
Commission's Rules to Permit Operation)	RM-9147
of NGSO FSS Systems Co-Frequency with)	RM-9245
GSO and Terrestrial Systems in the Ku-)	
Band Frequency Range)	DA 01-933
)	
Amendment of the Commission's Rules)	
to Authorize Subsidiary Terrestrial Use)	
of the 12.2-12.7 GHz Band by Direct)	
Broadcast Satellite Licensees and Their)	
Affiliates; and)	
)	
Applications of Broadwave USA, PDC)	
Broadband Corporation, and Satellite)	
Receivers, Ltd. to Provide a Fixed Service)	
in the 12.2-12.7 GHz Band)	

**COMMENTS OF THE SATELLITE
BROADCASTING AND COMMUNICATIONS ASSOCIATION
ON THE MITRE REPORT**

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May 15, 2001

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	ET Docket No 98-206
Commission's Rules to Permit Operation)	RM-9147
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Applications of Broadwave USA, PDC)	
Broadband Corporation, and Satellite)	
Receivers, Ltd. to Provide a Fixed Service)	
in the 12.2-12.7 GHz Band)	

**COMMENTS OF THE SATELLITE
BROADCASTING AND COMMUNICATIONS ASSOCIATION
ON THE MITRE REPORT**

The Satellite Broadcasting and Communications Association ("SBCA"), by its attorneys, pursuant to the Public Notice released by the Commission on April 23, 2001,¹ hereby submits these Comments on the MITRE Corporation's *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band*.²

I. INTRODUCTION AND SUMMARY

¹ FCC Public Notice, *Comments Requested on the MITRE Corporation Report on Technical Analysis of Potential Harmful Interference to DBS from Proposed Terrestrial Services in the 12.2-12.7 GHz Band* (ET Docket 98-206), DA 01-933 (April 23, 2001).

² SBCA's Comments are limited to major policy issues raised by the MITRE Report. SBCA directs the Commission to the comments being filed concurrently by its members, including DIRECTV, Inc. and Echostar Satellite Corporation, for a detailed discussion of the technical issues raised by the MITRE Report. In addition, to the extent any issues raised in the MITRE Report are addressed by SBCA's previous filings in this proceeding, SBCA hereby incorporates such filings in these comments.

Pursuant to Section 1012, Prevention of Interference to Direct Broadcast Satellite Services, of the Commerce, Justice, State and Judiciary Appropriations Act,³ the Commission directed the MITRE Corporation to prepare a report analyzing the effects of authorizing terrestrial Multichannel Video Distribution and Data Service (“MVDDS”) operation in the 12.2-12.7 GHz (“12 GHz”) band. On April 18, MITRE Corporation delivered its report, entitled “Analysis of Potential MVDDS interference to DBS in the 12.2-12.7 GHz band” (the “MITRE Report”), which the Commission entered into the record of the instant proceeding. The MITRE Report concludes that MVDDS operations will cause “significant interference” to DBS subscribers and thus substantiates what SBCA, DBS operators and others have been telling the Commission since Northpoint first proposed to shoehorn itself into the DBS band.

In the *First Report and Order*⁴ in the above-captioned proceeding, the Commission authorized terrestrial MVDDS operations in the 12 GHz band. As SBCA has demonstrated in its comments, reply comments, petition for reconsideration, and reply to oppositions to its petition for reconsideration submitted in this proceeding, the Commission’s decision amounted to a wholesale repudiation of more than 20 years of Commission policy on terrestrial-satellite spectrum sharing both within and outside the 12 GHz band and did not meet the standards for reasoned decision-making set forth in the Administrative Procedure Act. Particularly troublesome are the undeniable facts that the Commission (i) based its decision solely upon test data supplied by Northpoint Technologies, Ltd. (“Northpoint”), dismissing – without explanation – extensive test data supplied by DBS parties that controverts the test data supplied by Northpoint, and (ii) made its decision with full

³ H.R. 5548, Pub. L. No. 106-553, 114 Stat. 2762A-141 (2000).

⁴ *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, First Report and Order and*

knowledge that MVDDS cannot function without causing harmful interference to DBS operations, which have priority status in the 12 GHz band.

As detailed below, the release of the MITRE Report makes clear that the Commission's decision in the *First Report and Order* to authorize MVDDS was incorrect and should be reversed. The MITRE Report not only concluded that MVDDS poses a significant interference threat to DBS operations, but used Northpoint-supplied equipment in reaching its conclusion. The MITRE Report thus casts substantial doubt on the validity of the test data supplied by Northpoint which served as the sole justification for the Commission's decision to authorize MVDDS. Northpoint's *ex parte* campaign to ameliorate the MITRE Report's damaging conclusions are unconvincing and do not alter the fundamental problems with MVDDS or the clear error of the Commission's decision to authorize MVDDS.

DBS has operational priority in the 12 GHz band over fixed service operations, such as MVDDS, which are expressly prohibited from causing harmful interference to DBS operations in the 12 GHz band. As SBCA and others have already made clear in prior filings in this proceeding, it is undisputed that harmful interference exists as an elemental aspect of MVDDS design. The MITRE Report effectively confirms this fact. The Commission's proposals to address the harmful interference caused by MVDDS through mitigation is inappropriate in this case, where it is undisputed that MVDDS will, by design, cause harmful interference to *priority* DBS operations. Moreover, any mitigation measures that would be implemented at DBS consumer premises are unlawful.

Further Notice of Proposed Rulemaking, ET Docket No. 98-206, FCC 00-418 (Dec. 8, 2000) ("*First Report and Order*" and "*FNPRM*").

II. THE MITRE REPORT MAKES CLEAR THAT AUTHORIZING MVDDS IN THE 12 GHZ BAND WILL SUBJECT DBS OPERATIONS TO SIGNIFICANT INTERFERENCE

The MITRE Report concludes that “MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation in many realistic operational situations.”⁵ Significantly, the MITRE Report reached this conclusion based upon testing of a “single channel MVDDS transmitter supplied by Northpoint.”⁶ This conclusion casts substantial doubt on the validity of the test data submitted by Northpoint in this proceeding. Because the Commission’s decision to authorize MVDDS in the 12 GHz band was based solely upon Northpoint’s test data, the MITRE Report’s conclusion has erased the factual predicate for the Commission’s decision. Accordingly, the Commission’s decision to authorize MVDDS must be reversed.

Immediately upon release of the MITRE Report, Northpoint launched an *ex parte* public relations campaign at the Commission in an apparent effort to re-write the MITRE Report’s damaging conclusions and cast them in a more favorable (if unsupported) light. For example, Northpoint comments that the MITRE Report’s conclusion that “MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation” stands for the proposition that “‘Generic’ MVDDS can pose an interference threat.”⁷ Northpoint’s interpretation is incorrect. In fact, the MITRE Report reached its conclusion that MVDDS poses significant interference to DBS operations based upon testing of a “single channel MVDDS transmitter *supplied by Northpoint*.”⁸ Thus, the

⁵ MITRE Report at xvi.

⁶ *Id.* at 3-13.

⁷ Annotated Version of MITRE Technical Report - Abstract and Executive Summary, Northpoint Technology, Ltd. *Ex Parte* communication (April 27, 2001); *see also* Northpoint Technology, Ltd. *Ex Parte* communication (May 3, 2001).

⁸ MITRE Report at 3-13 (emphasis added).

MITRE Report makes clear that *Northpoint's* design for an MVDDS service – not “generic” MVDDS systems – poses a significant interference threat to DBS operations. Moreover, the MITRE Report’s specific findings and exclusive use of Northpoint equipment make clear that the Commission’s assertion in the *First Report and Order* that “[t]ests conducted in the 12.2-12.7 GHz band by Northpoint under an experimental authorization confirm that the MVDDS could operate without excessively impacting DBS subscribers” was unsupported by objective data and unfounded as a basis for authorizing MVDDS service.⁹ The MITRE Report further confirms that the Commission’s dismissal of DIRECTV’s and EchoStar’s test data because “there were no reported DBS outages attributable to the tests”¹⁰ was wholly erroneous; as the MITRE Report indicates, “MITRE believes that DBS customers may not *know* what is causing a particular outage, or the reason for its duration.”¹¹ In short, the MITRE Report invalidates the bases of the Commission’s decision to authorize MVDDS and warrants immediate reversal of that decision.

Northpoint further takes the MITRE Report’s text out of context in commenting that the “bottomline” of the report is that “MITRE recommends licensing of new service.”¹² In fact, MITRE did nothing of the sort, but rather proffered a range of recommendations (not a single one of which affirmatively recommended moving forward with MVDDS licensing) and acknowledged that “it is the FCC that must ultimately resolve the various policy issues and the approach to licensing new MVDDS services.”¹³ The recommendation proffered by MITRE addressed ways in which the “significant interference” caused by MVDDS might be

⁹ *First Report and Order* at ¶ 214.

¹⁰ *Id.* at ¶ 215.

¹¹ MITRE Report at 6-8 (emphasis added).

¹² Annotated Version of MITRE Technical Report - Abstract and Executive Summary, Northpoint Technology, Ltd. *Ex Parte* communication (April 27, 2001). *see also* Northpoint Technology, Ltd. *Ex Parte* communication (May 3, 2001).

mitigated *if* the Commission decided to move forward with MVDDS licensing in the face of MITRE’s conclusions. As demonstrated below, however, mitigation techniques that require modification of DBS equipment owned by DBS subscribers are unlawful and should not be authorized.

III. MITIGATION TECHNIQUES DISCUSSED BY MITRE THAT WOULD BE IMPLEMENTED AT DBS CONSUMER PREMISES ARE UNLAWFUL

In allocating the 12.2-12.7 GHz band for DBS, the Commission gave DBS operations band priority over fixed service (“FS”) licensees, which are expressly prohibited from causing harmful interference to DBS operations in the 12 GHz band by footnote 844 of the United States Table of Frequency Allocations.¹⁴ As SBCA has made clear in its earlier filings, the Commission has acknowledged the priority status of DBS service, but also has acknowledged that MVDDS will cause harmful interference to DBS operations in areas around the MVDDS transmitter. In an effort to address the legal prohibition against interfering with DBS operations, the Commission has concluded that mitigation techniques can be deployed to

¹³ MITRE Report at xxi and 6-8.

¹⁴ 47 C.F.R. § 2.106, n.844; *see also* 47 C.F.R. § 101.147(p). As the Commission explained to Congress in reporting Northpoint’s request to operate on a secondary basis: “Stations of a secondary service: a) shall not cause harmful interference to stations of primary services to which frequencies are already assigned or to which frequencies may be assigned at a later date; b) cannot claim protection from harmful interference from stations of a primary service to which frequencies are already assigned or may be assigned at a later date . . .” *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454, 2001 FCC LEXIS 10, at n.9 (Jan. 2, 2001) (*citing* International Telecommunication Union Radio Regulations, Edition of 1998, Article S5, Section II -- Categories of services and allocations, S5.28 through S5.31). In addition, the Rural Local Broadcast Signal Act (“RLBSA”), which was enacted as Title II of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-544., requires the Commission to “ensure that no facility licensed or authorized” under the statute “causes harmful interference to the primary users of that spectrum,” in this case, the DBS service. *See* RLBSA, § 2002(b)(2). Further, Section 303(y) of the Communications Act of 1934, as amended (the “Act”), grants the Commission “authority to allocate electromagnetic spectrum so as to provide flexibility of use, if . . . such use is consistent with international agreements to which the United States is a party, and . . . such use would not result in harmful interference among users.” The Commission has indicated that it “interpret[s] the Section 303(y) review requirement as applicable to flexible use determinations by the Commission that would enable the sharing of specific spectrum bands by services treated as distinct by the international and domestic allocations process.” *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, 15 FCC Red 476, 487 (2000).

correct harmful interference caused by MVDDS operations.¹⁵ The MITRE Report similarly confirms that interference to DBS operations is an inherent aspect of MVDDS design and also suggests that various mitigation techniques may lessen the interference problem.

As SBCA made clear in its reply to oppositions to its petition for reconsideration, it is undisputed that harmful interference exists as an elemental aspect of MVDDS service. Any form of mitigation is an after-the-fact interference band-aid intended to cure a problem that is prohibited in the first place. MVDDS service should not be authorized unless, as a threshold matter, MVDDS systems are designed so that they are incapable of causing harmful interference to DBS operations under any conditions.¹⁶ Indeed, under the Commission's approach, it could "accommodate" *any* service in *any* band by simply forcing the incumbent priority band users to modify *their* systems to the extent necessary to make them immune to the harmful interference caused by the secondary service, as the Commission seeks to do in this proceeding. Managing spectrum usage in this fashion would render the Table of Frequency Allocations and the concept of priority status meaningless.

If the Commission elects to proceed with its ill-advised plan to implement MVDDS predicated upon on the availability of mitigation techniques, such mitigation may not be effected on the equipment and premises of DBS subscribers. Mitigation generally refers to notification and coordination and/or technical requirements (such as field strength limits) that are designed to prevent co-primary services (where a first-in-time, first-in-right policy

¹⁵ See, e.g., *First Report and Order* at ¶ 216 ("We note that the record in this proceeding demonstrates a variety of techniques that an MVDDS operator may use to protect DBS operations from harmful interference caused by MVDDS operations."); see also *FNPRM* at ¶ 271 ("Another alternative would be to simply require the MVDDS operator to mitigate harmful interference in response to DBS subscribers' complaints of increased unavailability caused by MVDDS operations.").

¹⁶ Northpoint itself claimed at the outset that "Northpoint will be able to engineer *its* systems so that [Northpoint] subscribers do not suffer harmful interference from other terrestrial sources." Northpoint Petition for Rulemaking at 20 (emphasis added). If Northpoint can engineer its system to make it immune from receiving

prevails) from interfering with each other – a situation that does not apply to MVDDS operations in the 12 GHz band, where DBS has priority over MVDDS operations. Significantly, these measures are implemented at the head-end (base station) facilities of the wireless network because this is the origination point for the interfering signal and where it is most efficient to remedy any interference caused by such signal. The MITRE Report’s suggestions concerning the application of mitigation techniques at the DBS receiver location – *i.e.*, the premises of the priority user in the 12 GHz band – is not only inefficient, but is contrary to law and common sense. Such mitigation actions, if carried out, would effectively force DBS consumers – who own right, title and interest in their equipment and receive their DBS service pursuant to contracts with DBS providers – to either accept modifications to their private property by an unrelated third-party or accept harmful interference from a secondary service to the DBS programming they receive under contract which is provided in full conformance with U.S. and international law.

U.S. consumers have embraced new DBS technology and have purchased state-of-the-art equipment in good faith reliance on its functionality – reliance which derives largely if not entirely from the FCC-required equipment authorization labeling affixed to such equipment, which informs consumers that the equipment operates in conformance with the FCC rules. Forcing millions of these consumers to shoulder the burden of a secondary service’s inability to engineer a system that complies with U.S. and international law improperly shifts the burden of regulatory compliance away from the regulated licensee on to a class of unregulated consumers over whom the Commission lacks jurisdiction. In effect, such approach is akin to forcing homeowners to board up the windows on their homes as a remedy against neighbors

interference, it is reasonable to require it to engineer its system to prevent it from causing interference to DBS, which is required by law.

throwing rocks at the homeowners' windows. SBCA is not aware of any analogous circumstance in which the Commission has required private individuals who are subscribers of a primary service to either modify their private property to accommodate a lower priority service, or accept interference that effectively abrogates the terms of their service contracts.

Neither the Commission nor the MITRE Report provides any legal, precedential or policy justification for adopting mitigation at the DBS subscriber's premises. The closest thing to any legal, precedential or policy justification offered for justifying mitigation at the DBS subscriber's premises is the Commission's passing reference to the procedures used to address FM blanketing interference set forth at 47 C.F.R. § 73.318.¹⁷ These rules, however, do not in any way support mitigation at the DBS subscriber's premises. Blanketing interference is a form of interference that occurs where high-powered analog transmissions overload nearby receivers – resulting in “desensitization” where the receiver becomes locked-in to the carrier frequency of the high-powered transmissions.¹⁸ This interference phenomena occurs because of the susceptibility properties of the *receivers* themselves and typically affects cheaply produced, mass-market receivers that are not manufactured according to any immunity standards.¹⁹ Moreover, the saturation of the U.S. market with such susceptible receivers – and the attendant glut of consumer complaints that high-powered FM transmitter towers were interfering with their radios – can be traced to the Commission's historic policy of refusing to adopt immunity requirements for consumer electronics.²⁰ This policy resulted

¹⁷ *First Report and Order* at ¶ 271.

¹⁸ See, e.g., *FM Broadcast Station Blanketing Interference*, Report and Order, 57 RR 2d 126, at ¶ 24 (1984); *Amendment of Parts 73 of the Commission's Rules to More effectively Resolve Broadcast Blanketing Interference, Including Interference to Consumer electronics and Other Communications Devices*, Notice of Proposed Rulemaking, 11 FCC Rcd 4750 (1996).

¹⁹ *Id.*

²⁰ See, e.g., *Radio Frequency (RF) Interference to Electronic Equipment*, Notice of Inquiry, 70 FCC 2d 1685, 1688 (1978); *FM Broadcast Station Blanketing Interference*, Proposed Rule, 47 Fed. Reg. 18936, at ¶ 3 (1982); *FM Broadcast Station Blanketing Interference*, 57 RR 2d 126, at ¶ 24 (1984).

from the Commission's concern that mandating such requirements would drive up consumer prices, effectively shifting the burden of compliance with the non-interference rules for free broadcast services from service providers to the public at large.²¹ Indeed, the Congress amended Section 302 of the Act in 1982 to provide the Commission with authority to establish performance standards for consumer electronic devices precisely because there was considerable doubt as to whether the Commission had any jurisdiction over such devices in the first place.²² Accordingly, the Commission adopted the FM blanketing interference rules "to protect *listeners* of FM radio and viewers of television, *not* other licensees or permittees" without shifting the burden for interference compliance upon the public at large through mandating costly receiver immunity standards.²³

By contrast, MVDDS interference is not an RF propagation by-product of MVDDS operations, but rather is an inherent aspect of MVDDS design, which intentionally directs signals of sufficient power into the backlobes of DBS receive antennas, thus causing interference. Further, the problem of MVDDS interference has nothing at all to do with DBS subscriber equipment, which has been carefully and specifically engineered to receive and process 12 GHz satellite transmissions in accordance with international technical standards

²¹ See, e.g., *Radio Frequency (RF) Interference to Electronic Equipment*, Notice of Inquiry, 70 FCC 2d 1685, 1687 (1978).

²² Communications Amendments Act of 1982, Pub. L. No. 97-259, § 108, 96 Stat. 1087, 1091. As Congress explained in the legislative history of that law:

Many believe that the Commission does not now have authority to compel the use of protective devices in equipment which does not emit radio frequency energy sufficient in degree to cause harmful interference to radio communications. . . . The Commission has thus far acted in consonance with this belief. The Conference Substitute would thus give the FCC the authority to require that home electronic equipment and systems be so designed and constructed as to meet minimum standards of protection against unwanted radio signals and energy.

H.R. Conf. Rep. No. 97-765, at 21-22, 1982 U.S.C.C.A.N. at 2265-66. While the Congress further clarified that the Commission has exclusive jurisdiction over radio frequency interference incidents, courts have interpreted this grant of authority – codified at 47 U.S.C. § 302a(a)(1) – as being limited to "authority to regulate RF emissions *causing* interference." *Freeman, et al. v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 323 (2nd Cir. 2000) (emphasis added).

²³ *Greater Boston Radio, Inc.*, 8 FCC Rcd 4065, at n.1 (1993) (emphasis in original).

and the Commission's equipment authorization and marketing rules. Moreover, in dramatic contrast to inexpensive radio receivers, DBS equipment represents state-of-the-art technology that is frequently professionally installed.²⁴ Indeed, DBS receivers utilize high-gain antennas and for that reason (and others) are expressly excluded from the FM blanketing rules.²⁵ In short, MVDDS interference is not blanketing interference but rather intentional interference directed by design into DBS antennas.

IV. CONCLUSION

²⁴ SBCA is aware of only one non-broadcast instance where the Commission has adopted protections for consumer equipment based on the FM blanketing interference rationale, which is not analogous to the instant proceeding but rather further demonstrates that the rules are premised on the need to protect unwitting purchasers of poor-quality consumer equipment. After establishing the wireless communications service ("WCS") in the 2305-2320 and 2345-2360 MHz bands, the Commission adopted FM blanketing interference-like requirements for WCS licensees with respect to MDS/ITFS receivers, despite the fact that such receivers operate in the 2150-2162 MHz and 2500-2690 MHz bands. *See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 3977, 3983-86 (1997). However, the circumstances surrounding the WCS-MDS/ITFS situation are not applicable to the proposed "sharing" of the 12 GHz band by DBS and MVDDS operations. Specifically, the MDS/ITFS receivers utilized analog downconverters based on an inexpensive design which did not employ any filtering for the frequencies between 2162 MHz and 2500 MHz, resulting in minimal frequency selectivity and reception of signals throughout the entire 2.1-2.7 GHz band. *Id.* at ¶ 12. Further, the Commission – which adopted WCS pursuant to a formal spectrum allocation based upon the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996) – had initially imposed no power limit on WCS operations at all, and only after objections restricted WCS fixed, land and radiolocation land stations to 2,000 watts peak EIRP and WCS mobile and radiolocation mobile stations to 20 watts EIRP. *Id.* Finally, the trade association representing MDS/ITFS interests had itself concluded that the 20 watts EIRP would not cause destructive interference to MDS/ITFS reception. *Id.* The Commission's action was not a condition precedent to authorizing WCS – the Commission initially rejected calls to protect MDS/ITFS devices in adopting WCS precisely because the cause of the interference problem resided in the MDS/ITFS equipment and not in the WCS service – but rather an accommodation to protect consumers of MDS/ITFS receivers. By contrast, MVDDS apparently is being slotted under an existing allocation based solely upon a rulemaking petition and general plenary authority. Far from having a specific mandate from Congress to adopt MVDDS, and to the extent that the Commission attempts to cite the RLBSA as authority for its decision, the RLBSA makes clear that Congress does not desire authorization of a service that unquestionably interferes with DBS by expressly requiring that the Commission obtain independent testing precisely to ensure that no new service authorization would cause harmful interference to DBS service. Most importantly, the problem of MVDDS interference to DBS receivers has nothing to do with the manufacturing quality of DBS receivers – which have been carefully engineered to exacting international specifications for reception of satellite DBS signals within the 12 GHz band – but rather the crude technology of MVDDS design, which intentionally directs sufficiently high powered signals into the backlobes of DBS antennas using the very frequencies that have been internationally and domestically allocated to DBS on a priority basis.

²⁵ *See* 47 C.F.R. § 73.318(b).

Based upon the MITRE Report's conclusion that MVDDS will cause significant interference to DBS operations and the fact that such conclusion was arrived at using Northpoint equipment, SBCA urges the Commission to reverse its decision to authorize terrestrial MVDDS operations in the 12.2-12.7 GHz band and to revise its rules accordingly. If the Commission elects to proceed with authorizing MVDDS service, it must reject all mitigation measures discussed in the MITRE Report which involve making any form of alterations, relocations or replacement of DBS subscriber equipment.

Respectfully submitted,

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May 15, 2001

APPENDIX E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking)	
to Amend Section 1.4000 of the)	
Commission's Rules to Preempt)	
Restrictions on Subscriber Premises)	
Reception or Transmission Antennas)	
Designed to Provide Fixed Wireless)	
Service)	
)	
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Provisions in the Telecommunications)	
Act of 1996)	
)	
Review of Sections 68.104 and 68.213 of)	CC Docket No. 88-57
the Commission's Rules Concerning)	
Connection of Simple Inside Wiring to the)	
Telephone Network)	

To: The Commission

**PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION OF THE
SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION/
SATELLITE INDUSTRY ASSOCIATION BROADBAND & INTERNET DIVISION**

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking)	
to Amend Section 1.4000 of the)	
Commission's Rules to Preempt)	
Restrictions on Subscriber Premises)	
Reception or Transmission Antennas)	
Designed to Provide Fixed Wireless)	
Service)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	
)	
Review of Sections 68.104 and 68.213 of)	CC Docket No. 88-57
the Commission's Rules Concerning)	
Connection of Simple Inside Wiring to the)	
Telephone Network)	

To: The Commission

PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION OF THE
SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION/
SATELLITE INDUSTRY ASSOCIATION BROADBAND & INTERNET DIVISION

INTRODUCTION AND SUMMARY

The Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division ("SBCA/SIA") hereby submits this Petition for Clarification and Partial Reconsideration of the Commission's order extending its rules on over-the-air reception devices ("OTARD rules") to customer-end antennas used for transmitting or receiving fixed wireless signals.¹ For the reasons set forth below, the Commission should

¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum dc-246739

clarify that its regulations regarding radiofrequency (“RF”) emission safety issues, which are applicable to all FCC-regulated transmitters including fixed wireless antennas, preempt state and local authorities and homeowners associations from adopting different RF exposure standards. In addition, the Commission should reconsider those aspects of its Order that (a) recommend professional installation of, or a specific location for, satellite subscriber antennas and (b) allow local governments, property owners or homeowner associations to impose such a condition.

I. THE EXISTING FCC GUIDELINES REGARDING RADIOFREQUENCY EMISSIONS ARE APPLICABLE TO FIXED WIRELESS SYSTEMS

Fixed wireless systems, using two-way satellite broadband technology, provide a vast array of advanced telecommunications services such as "always-on" multimedia-rich interactive Internet-protocol-based services, as well as streamed and webcast content to consumers nationwide. This technology, which is not limited by proximity to local wirelines and head-end switches, offers consumers independence from wireline Internet connections at significantly faster speeds than current modems and offers a competitive alternative to cable modems. Moreover, these satellite services are also uniquely able to serve remote and rural communities where wireline and terrestrial wireless services may be unavailable due to the high costs of installation or paucity of potential customers or both.

The customer-end antennas used to provide satellite broadband services are similar in size and technology to those previously covered by the Commission’s OTARD rules. By extending the OTARD rules to encompass fixed wireless devices, the FCC simply included within the purview of the rules all customer-end antennas and supporting structures of the same physical type, regardless of the nature of the services provided through the antenna.² With respect to the safety regulations that apply to such antennas, the Commission’s Order explicitly

Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366, ¶ 97 (Oct. 25, 2000) (“Order”).

² Order, ¶ 99.

stated that its guidelines regarding radiofrequency exposure limits apply to “all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems.”³ Therefore, the OET Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (“OET 65”)⁴ and Sections 1.1307(b)(1) and 1.1310 of the Commission’s rules, 47 C.F.R. §§ 1.1307(b)(1) and 1.1310 (1999), apply to fixed wireless transceivers.

The SBCA/SIA supports the application of the existing FCC guidelines to fixed wireless systems. The existing guidelines establish comprehensive exposure limits that apply to a range of transmission and reception technologies, including both fixed transmitters and mobile and portable devices.⁵ The radiofrequency emission issues that arise with respect to fixed wireless systems are encompassed within the Commission’s existing limits. The Commission has determined that the existing guidelines are sufficient to adequately protect humans from excessive exposure to RF energy, including exposure from fixed wireless devices. These existing guidelines and the additional safeguards set forth in the Order, applicable to an area – RF emission – in which the FCC has particular expertise, and is uniquely qualified to govern, resolve any RF emission safety issues relating to fixed wireless transceivers.

II. THE COMMISSION SHOULD CLARIFY THAT THE RULES REGARDING THE RADIOFREQUENCY EMISSION LIMITS ARE PROPERLY DECIDED ON THE FEDERAL LEVEL

The Order provided that fixed wireless licensees, including satellite providers, must exercise reasonable care to protect users and the public from radiofrequency exposure in excess of the FCC’s limits.⁶ The Order did not specifically state, however, that the Commission’s rules regarding RF emission are exclusively federal, such that state and local regulation is preempted in that area. While such preemption appears to be implicit in the Order and other relevant

³ *Id.*, ¶ 117 and n.290.

⁴ Federal Communications Commission, Office of Engineering & Technology, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* (1997).

⁵ *Id.* at 1.

documents,⁷ SBCA/SIA strongly urges the Commission to clarify the Order by ruling that state and local governments may not adopt different RF exposure limits.

A. Federal Regulations Have Preempted the Field With Respect to Limits on Human Exposure to RF Energy

Of the several forms of federal preemption, the most pertinent here is “field preemption,” pursuant to which state law is preempted when it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.⁸ Such an intent “may be inferred from a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,’ or where an Act of Congress ‘touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”⁹ For the reasons set forth below, SBCA/SIA believes that federal law has preempted the field of regulations establishing limits on human exposure to RF energy.

Several statutory provisions demonstrate the extent of the FCC’s broad authority and responsibility to regulate RF exposure issues. Section 151 of the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. § 151, states that one of the purposes of the Act was to “centraliz[e] authority heretofore granted by law to several agencies” and to “grant[] additional authority with respect to interstate and foreign commerce in wire and radio communication” to the FCC. Section 303(e) of the Act, 47 U.S.C. § 303(e), which sets forth the powers and duties of the Commission, provides that it shall regulate “the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the

⁶ Order, ¶ 117.

⁷ For example, the FCC and its Local and State Government Advisory Committee have produced an RF emission safety guide for local government officials that refers repeatedly and exclusively to “the FCC’s guidelines” and “the FCC’s exposure limits.” Federal Communications Commission, Local and State Government Advisory Committee, *A Local Government Official’s Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures and Practical Guidance* (June, 2000).

⁸ *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

⁹ *Id.*

apparatus therein.” Congress instructed the FCC to “promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services”¹⁰ and to set rules regarding the environmental effects of RF emissions within a time certain.¹¹

Federal regulations have the same preemptive force as federal statutes.¹² The FCC has exercised its rulemaking authority to extensively regulate human exposure to RF energy. The Commission sets forth its requirements regarding licenses and permits for facilities that involve RF exposure in 47 CFR § 1.1307(b). The exposure limits are specified in 47 CFR § 1.1310 in terms of frequency, electric and magnetic field strength, power density and averaging time. OET 65 sets forth in detail the criteria and guidelines for evaluating human exposure to RF emissions and determining whether transmitting facilities, operations and devices comply with the exposure limits. The FCC intended its rules to “provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.”¹³ The FCC’s guidelines on RF exposure not only satisfy the mandate of the Act but also represent a consensus view of the federal agencies responsible for matters relating to the public safety and health, including the U.S. Environmental Protection Agency and the Food and Drug Administration.¹⁴ The comprehensive regulations, in addition to the statutory provisions cited above, make clear that Congress intended the Commission to possess exclusive authority over RF emission issues.

¹⁰ Pub. L. No. 104-104, 110 Stat. 114 (1996).

¹¹ Pub. L. No. 104-104, 110 Stat. 151 (1996).

¹² *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 321 (2d Cir. 2000).

¹³ *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, 13496 (1997).

B. Preemption is Appropriate Because State and Local Regulation Will Interfere with the Deployment of Fixed Wireless Technologies to the Public.

In the past, the FCC has declined to expressly preclude state and local authorities from promulgating rules regarding RF emissions, other than in the context of personal wireless services.¹⁵ In adopting the most recent revisions to OET 65, however, the FCC recognized that broader preemption might be appropriate if state and local regulation of RF emissions posed “an obstacle to the scheme of federal control of radio facilities set forth in the Communications Act.”¹⁶

Broader preemption is appropriate here because state and local regulation, by interfering with the deployment of innovative fixed wireless technologies to the public, would pose an obstacle to Congress’ intention that the Act promote telecommunications competition and the deployment of advanced telecommunications capability.¹⁷ Two-way satellite broadband technology offers affordable, extremely high-speed services that became technically and economically feasible for deployment in the consumer market only in the past year. These advanced telecommunications services, currently provided via Ku-band satellite systems, present an essential competitive choice for broadband communications that is not constrained by proximity to local wirelines and head-end switches. These systems present a vast array of interactive Internet-protocol-based services, as well as streamed and webcast content to users nationwide. Satellite broadband offers consumers independence from wireline Internet connections at downstream speeds which today are up to eight times greater than telephone

¹⁴ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15124 (1996).

¹⁵ *See id.*, 15182-84; *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, 13549-50 (1997).

¹⁶ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15184.

¹⁷ *See, e.g., Pub. L. No. 104-104, 110 Stat. 152 (1996)* (the Commission should encourage the deployment of high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology).

modems, and with the next generation Ka-band satellite systems (launching as early as year-end 2001) will be hundreds of times faster than current home modems.

In addition, two-way broadband satellite systems will be significant providers of high-speed Internet services to rural and underserved areas of the United States. Broadband satellite companies plan to build on the success of direct-to-home satellite television platforms that currently provide service to nearly 16 million American homes – over 7.5 million of which are located in rural counties throughout the U.S. Satellites provide instant communications at competitive prices to any consumer who is located within a national footprint – as opposed to wireline systems that must build out systems over time and have failed to do so in less populated areas because of higher per capita costs. For many sparsely populated areas, satellites are the only realistic potential source of broadband services. SBCA/SIA believes that the prospect of multiple conflicting state and local regulatory schemes will interfere with the deployment of these innovative broadband services to consumers.

In adopting the Telecommunications Act of 1996, Congress recognized that the burgeoning growth of the cellular and PCS industries in the United States could be thwarted by a morass of conflicting and burdensome state and local regulations restricting facilities siting on the basis of RF emissions. Accordingly, Congress expressly preempted the field by enacting Section 332(a)(7), which provides that “No State or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radiofrequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” As the legislative history of Section 332(a)(7) recognized,

A high quality national wireless telecommunications network cannot exist if each of its component must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government,

solely on the basis of RF emissions, should block the construction of sites and facilities or installation of equipment which comply with the Commission RF standards.¹⁸

The conclusion of the House Report applies with equal force in the OTARD context. Indeed, the preemption embodied in Section 332 may well have been drafted to encompass the services at issues in this proceeding if the Members of Congress and the affected industries could have foreseen the rapid advances that would enable cost-effective deployment of these services in the consumer market. But in 1996, no one anticipated either the speed with which these advances would be achieved or the magnitude of the public's desire to have available – in their homes – “always-on” two-way broadband services. Now that the benefits of these advanced technologies have been introduced to consumers, however, the Commission must ensure that the delivery of high-speed broadband services is not thwarted by the real possibility that state and local governments and homeowners associations will attempt to adopt conflicting requirements, including more onerous RF exposure limits. High quality video, data and high-speed Internet services, among others provided by fixed wireless devices, cannot exist if each community is permitted to set different RF standards for OTARD devices. OET 65 contains “adequate, appropriate and necessary levels of protection to the public” with respect to OTARD devices as well as personal wireless equipment. Accordingly, the Commission should make clear that state and local regulations that are different from the standards set forth in OET 65 are preempted.

As the Commission expressly recognized in the Order, one of the legislative purposes behind Section 332(c)(7) was to preserve local zoning authority over personal wireless service facilities.¹⁹ Yet, even in that context, Congress felt compelled to preempt state and local authority over RF emissions. The Commission also recognized in the Order that Section 207, enacted simultaneously with Section 332(c)(7), circumscribed local zoning authority over

¹⁸ 104 H. Rpt. 204, at 95 (1995).

¹⁹ Order, ¶ 110.

customer-end antennas used for video services.²⁰ It would be ironic indeed if the OTARD rules, which were designed to circumscribe local authority, nevertheless afforded state and local governments and homeowners associations an opportunity to impose conflicting and more onerous RF limits.

Although the OTARD rules are intended to limit local authority, they provide “an exception for ‘a clearly defined, legitimate safety objective’ provided the objective is articulated in the restriction or readily available to antenna users and is applied in a non-discriminatory manner and is no more burdensome than necessary to achieve the articulated objectives.”²¹

Specifically, Section 1.4000(b) provides:

Any restriction otherwise prohibited by paragraph (a) of this section is permitted if: (1) it is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas to which local regulation would normally apply.

As explained above, the Commission already has developed standards that adequately protect human health and safety from the RF emissions of OTARD devices, including fixed wireless transceivers. Any state or local regulation imposing different or more onerous exposure limits would, therefore, by definition, be more burdensome than necessary to accomplish a safety objective and thus would fail to satisfy the rule’s test for an exception to OTARD preemption. The burden here is obvious – the cost of complying with varying state and local restrictions would be astronomical for nationwide satellite broadband systems.

²⁰ *Id.*, ¶ 116.

C. Preemption is Appropriate Where There is a Conflict with Federal Law

State law is also preempted to the extent that it actually conflicts with federal law.²²

Thus, courts have found preemption where it is impossible for a private party to comply with both federal and state requirements, or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²³ Here, allowing state and local authorities and homeowners associations across the country to impose regulations that potentially conflict with the standards set by the FCC could only hamper deployment of innovative satellite broadband services to consumers and must therefore be preempted.

III. THE COMMISSION SHOULD RECONSIDER PERMITTING LOCAL AUTHORITIES TO REQUIRE PROFESSIONAL INSTALLATION OF FIXED WIRELESS EQUIPMENT

The SBCA/SIA also requests the Commission to reconsider those aspects of its Order that (a) recommend professional installation of, or a specific location for, satellite subscriber antennas and (b) allow local governments, property owners or homeowner associations to impose such a condition. Specifically, the Order states:

... it is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time. To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition of such requirements under the OTARD rules will not apply.²⁴

Reconsideration is appropriate because these recommendations are not essential elements of RF safety, but merely address steps that may currently be appropriate to ensure safety from RF emissions. The statement is thus susceptible to being misapplied by local governments, property

²¹ *Id.*, ¶ 117.

²² *English v. General Electric Co.*, 496 U.S. at 79.

²³ *Id.*

²⁴ Order, ¶ 119.

owners and homeowner associations in a manner that may unduly constrain the deployment of satellite antennas by imposing obsolete requirements on the next generation of consumer satellite technology for which more advanced protective mechanisms may be developed.

As outlined above, the SBCA/SIA acknowledges and supports the requirement that satellite services meet Commission guidelines on RF exposure. It is in this context that the Commission addressed in the Order professional installation of and locations for satellite subscriber antennas. Rules regarding antenna installation and location, however, are not the exclusive means of ensuring that the RF safety guidelines are met. The Commission acknowledges as much when it does not preclude the possibility that local governments, property owners and homeowner associations might seek to require the presence of a safety “interlock” feature on some transceivers.²⁵ Even in cases where such safety interlocks (or other means) adequately address RF concerns, however, the Order would still allow professional installation to be mandated on a local level. Requiring professional installation where it is not needed or imposing conditions on antenna location would unduly increase the cost and complexity of providing satellite service. Thus, allowing local governments, property owners or homeowner associations to mandate professional installation may make satellite service uneconomical or undesirable for customers in those localities.

The SBCA/SIA believes that the Commission’s concerns regarding RF safety are being met through a variety of means beyond those identified in the Order. Among other things, technologies exist or are being developed to address these concerns, including physical barriers that prevent human contact with the transmit beam, and software “shutdown” mechanisms that ensure that transmissions stop promptly when the beam path is interrupted, preventing human RF exposure in excess of the established limits. Thus, the recommendation of professional

²⁵ *Id.*, n.296.

installation of, or a specific location for, satellite subscriber antennas is not properly included in the Order.

Also, as outlined above, only the Commission, not local authorities, property owners and homeowner associations, has the authority to set policy with respect to RF safety issues. The Commission has addressed the RF safety issues of installation and location of subscriber antennas in the context of licensing antennas to be used in uncontrolled consumer environments. Moreover, the Commission has indicated that it intends to initiate a rulemaking to review and harmonize its regulations regarding transceiver equipment approval for RF exposure.²⁶ That proceeding would provide an appropriate opportunity to explore more fully the RF concerns that have given rise to the Commission's statements about antenna installation and to state in a single rule, rather than through individual licensing decisions, the national policies that the Commission has established in this area. Thus, the SBCA/SIA recommends that the Commission defer to that proceeding the question of where and how OTARD-type devices should be installed. Among other things, doing so would allow a record to be developed about the latest means that can be employed to limit human exposure to RF emissions and about the most commercially expedient means that are available to address those RF concerns. In any event, consistent with the preemption arguments made above, the Commission should preclude local governments, property owners or homeowner associations from imposing installation or location conditions that are intended to or have the effect of addressing RF exposure. Those are matters that should be within the Commission's sole jurisdiction.

CONCLUSION

For the reasons set forth above, the Commission should (i) clarify that its regulations governing human exposure to RF emissions preempt state and local regulation of such matters and (ii) reconsider those aspects of its Order that (a) recommend professional installation of, or a

specific location for, satellite subscriber antennas and (b) allow local governments, property owners or homeowner associations to impose such a condition irrespective of the unreasonable burdens on consumers and service providers resulting from such conditions.

Respectfully submitted,

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